U.S. Department of Labor

Office of Administrative Law Judges
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Issue date: 02Oct2002

BRB NO.: 01-0423
(Formerly BRB No. 98-1064)

CASE NO.: 1997-LHC-0144

OWCP NO.: 16-161199

In the Matter Of:

JEREMIAH BRUNSON
Claimant

v.

RYAN WALSH, INC.
Employer/Self-Insurer

APPEARANCES:

Edward E. Boshears, Esq.
For the Claimant

Shari Sigman Miltiades, Esq.
For the Employer/Self-Insurer

BEFORE: DAVID W. DI NARDI
District Chief Judge

DECISION AND ORDER ON SECOND REMAND - DENYING BENEFITS

This is a claim for worker's benefits under the Longshore and Harbor Workers' Compensation Act, as amended (33 U.S.C. §901, **et seq.**), herein referred to as the "Act." The hearing was held on June 16, 1997 in Savannah, Georgia, at which time all parties were given the opportunity to present evidence and oral arguments. The following references will be used: TR for the official hearing transcript, ALJ EX for an exhibit offered by this Administrative Law Judge, CX for a Claimant's exhibit and RX for an Employer's exhibit. This decision is being rendered after having given full consideration to the entire record.

PROCEDURAL HISTORY

Administrative Law Judge Edward J. Murty, Jr., by **Decision and Order** issued on March 5, 1998, concluded that Jeremiah Brunson ("Claimant" herein), had sustained a work-related traumatic injury on July 20, 1994 while working as a stevedore for Ryan-Walsh Stevedoring, Inc. ("Employer") on the waterfront in Brunswick, Georgia, and that Claimant "was clearly aware on July 20, 1994 that he had suffered a work-related injury." Judge Murty denied the claim because (1) the injury had resulted in no disability, (2) Claimant "would be unable to return to the waterfront for this reason (**i.e.**, he testified positive for illicit drug use on three occasions "and was permanently suspended as a longshoreman") even had he sustained no injury whatsoever" and (3) his back and heart problems were not caused by his July 20, 1994 injury. Claimant timely requested consideration of the denial of his claim for benefits and the motion was also denied by Judge Murty.

Claimant timely filed an appeal with the Board and the Board, by **Decision and Order** issued on April 20, 1999, "agree(d) with Claimant that the Administrative Law Judge erred by failing to consider whether Claimant was entitled to invocation of the Section 20(a) presumption of causation" with reference to Claimant's left shoulder and cardiac problems, the Board concluding, "thus the Claimant is entitled, as a matter of law to invocation of the Section 20(a) presumption that his shoulder and heart conditions are causally related to his employment (footnote omitted). **See, e.g., Frye v. Potomac Electric Power Co.**, 21 BRBS 194, 196 (1988)." Accordingly, the Board remanded the matter to the Office of Administrative Law Judges for a reconsideration of the evidence to determine "whether the Employer has established rebuttal of the Section 20(a) presumption with regard to Claimant's shoulder injury and heart condition" and, if not, the Judge "must then consider the nature and extent of Claimant's disability." **Brunson, Sl. Op.**, pp. 3-4.

As Judge Murty had retired, the matter was assigned to this Administrative Law Judge and the parties were so advised by **ORDER** issued on October 18, 2000. (ALJ EX A) Claimant waived his right to a hearing and he submitted supplemental evidence in the form of medical bills (CX A) and various documents already in this record. (CX B) Claimant's brief on remand was filed on December 21, 1999 (CX C) and Employer's reply brief (EX 1) was filed on November 24, 2000. Claimant's response brief (CX D) was filed on December 11, 2000. Claimant also filed supplemental material on December 21, 2000 previously submitted at his hearing (CX E), at which time the record was closed. (ALJ EX B)

Summary of the Evidence

Claimant testified that on July 20, 1994 he was struck in the buttocks by a forklift. He hit his elbows, knees and chest in front. He testified that he stopped working after the accident and received medical treatment on the date of the accident. He drove himself to Glynn Immediate Care Center where he was given medication and x-rayed. He was also given a drug screen, pursuant to his ILA contract, and he tested positive for cocaine and marijuana. (TR 24-25) He returned to work the following day, July 21, 1994, for Cooper/T.Smith, another stevedoring company. (TR 48) He testified that no light duty work is available for longshoremen.[1] He testified that on July 21, 1994, he was driving vehicles off a roll-on/roll-off ship when he was involved in another accident. Claimant testified he blacked out. This testimony, however, was contradicted by Mr. Hogan. (TR 27, 49) Following this accident, the Claimant underwent a drug screen, and again screened positive for cocaine and marijuana. On July 22, 1994, the Claimant admitted himself to Charter Hospital for drug treatment. The Claimant denied using drugs on either date. This testimony was contradicted by his admission reports from Charter Hospital. Since this accident, the Claimant failed another random drug screen in 1996 and has therefore been permanently barred from the union and stevedoring work. He has made no effort to be reinstated. (TR 45-46)

Claimant testified that following his release from Charter Hospital, he had some pain, but it was not severe pain. During the time he was undergoing treatment at Charter, he experienced an episode of congestive heart failure and was hospitalized at Southeast Georgia Regional Medical Center. He did testify, however, that in August and September of 1994 he did not believe he would be able to return to work as a longshoreman, and when his pain worsened in November, 1994, he did not think he would be able to do any work. This is contradicted by his interrogatory answers and by his decision to not seek any benefits until January, 1995. In addition, the disability claim he made in 1994 after his discharge from Charter expressly excluded a job inquiry. (TR 30-31)

Claimant testified that he complained about his back and shoulder pain to Dr. Martinez, his cardiologist. However, this testimony is contradicted by Dr. Martinez's notes and testimony. Claimant also testified that he contacted someone at Ryan Walsh for medical treatment but could not be specific as to whom or where or when he called. This testimony was contradicted by Stan Henslee,

[1]A key fact that the Board has consistently overlooked herein.

the Employer's then representative. Claimant also testified that he experienced pain in his hip and back, and that the pain prohibits him from doing longshore work because there is no light duty work. He acknowledged, however, that his disability claim is a result of his other medical problems and not these orthopedic/neurological symptoms. (TR 35-36)

Claimant acknowledged that on the date of the accident, he drove himself to Glynn Immediate Care, was released and worked the following day for Cooper/T.Smith. He drove vehicles off of a ship, including stick shift and automatic vehicles. He worked a full day as his auto accident did not occur until the end of the shift. (TR 49)

Claimant further testified that on July 22, 1994, the day after his Cooper/T.Smith accident, he did not even try to work. (TR 55):

> "Q: You didn't try to go to work because you knew they wouldn't let you work.
>
> A: Of course. I knew they wouldn't let me work...
>
> Q: And, because you tested positive to drugs.
>
> A: Yes, ma'am. I know that. So why would I go back down there trying to work and I knew I wasn't going to be able to work?"

Claimant denied being convicted of any drug-related offenses, and could not recall being incarcerated as recently as 1993. (TR 55-56) However, introduced into evidence were certified copies of his criminal convictions for possession of cocaine on July 8, 1992 (RX 9-4); for violation of Florida drug abuse laws in 1983 (RX 9-10); and for violation of his probation in December, 1992 (RX 9-6, 9-7). These documents contradicted his testimony.

William James Hogan, a stevedore for Cooper/T.Smith, is responsible for working with the longshoremen in the loading and unloading of ships. Claimant worked for Mr. Hogan unloading Hyundai cars on July 21, 1994. Claimant began working at 8:00 a.m. Mr. Hogan supervised and observed the entire operation, including observing Claimant at work. Claimant made no complaints to Mr. Hogan, did not mention an accident the previous day and required no special treatment as he performed his work. Regardless of the physical requirements of the work that day, Mr. Hogan testified that Claimant could not have worked as he did if he had any restrictions or any physical problems. Mr. Hogan testified that

approximately 997 cars were unloaded. Late in the afternoon, heavy rains left standing water. Mr. Hogan observed that Claimant swerved to miss standing water and drove his vehicle into a ditch. Mr. Hogan testified that Claimant was sent for a drug test, which he failed. He attempted to work for Cooper/T.Smith the following day and was refused employment. In addition, Mr. Hogan observed that the police found a plastic bag of white powder under the driver's seat of the vehicle that Claimant crashed. Mr. Hogan also testified that the mat that Mr. Brunson was rolling was not heavy unless the entire mat was rolled up. He likened it to rolling up a rug. (TR 60-65)

Stan Henslee, who was formerly responsible for claims at Ryan Walsh, is now Vice-President of Claims for Homeport Insurance Company. Mr. Henslee testified as to Ryan Walsh's activity on this claim and introduced into evidence the Claimant's file. (RX 12) Mr. Henslee testified that he personally began handling the file in late 1994 or early 1995. He testified that at the time of injury, medical treatment was authorized with Glynn Immediate Care. The medicals were paid because at the time of treatment, the Employer was unaware of the positive drug screen and the Employer felt obligated to pay for the medical treatment. (TR 73)

An LS-202, First Report of Injury, was filed on July 27, 1994 and received by the OWCP, U.S. Department of Labor, on August 1, 1994. An acknowledgment from the U.S. Department of Labor, was post-marked August 24, 1994. Mr. Henslee testified that his file reflected no request by the Claimant for additional medical treatment. There is absolutely no record of any communication between Claimant and any of Employer's claims' offices. (TR 71-73; RX 12)

The first activity following the injury was when the Claimant's attorney, Mr. Boshears, wrote a letter to Mr. Henslee dated May 2, 1995 and Mr. Henslee responded on May 17, 1995 with a copy of the LS-202. On June 5, 1995, Mr. Boshears wrote another letter contending that an LS-203 was being filed. There was no accompanying letter to the U.S. Department of Labor and there was no evidence that the LS-203 was actually enclosed with the letter of June 5, 1995. In response to Mr. Boshears' letter, Mr. Henslee called the U.S. Department of Labor on June 26, 1995 and learned that no claim in any form had been filed. Mr. Henslee called the U.S. Department of Labor again on November 7, 1995, and was again advised that no claim for injury had been filed by or on behalf of Claimant. (TR 75-76; RX 12 at 3, 5 6)

Mr. Henslee did receive correspondence from the Department of Labor, dated November 14, 1995, indicating that no claim had been

filed. On February 19, 1996, Mr. Henslee finally received a copy of an LS-203, Notice of Claim, from the U.S. Department of Labor which showed a stamped filing date of December 7, 1995. In response, Mr. Henslee filed a Notice to Controvert, (**i.e.**, Form LS-207) on February 21, 1996. (TR 77-78; RX 12 at 3, 4)

Mr. Henslee testified that the next request for medical treatment from Claimant was made in June of 1996, when authorization was sought for treatment by a chiropractor. (TR 78; RX 12 at 3)

Mr. Henslee testified that when Mr. Boshears first communicated with him seeking medical treatment, Mr. Henslee thought the medical treatment being sought was for the Charter-By-The-Sea records that had been submitted for congestive heart failure. In addition, Claimant's only complaint at the time of the accident was for shoulder pain. He never made complaints of back or neck pain. Mr. Henslee found no correlation to the requests for treatment in 1995 and 1996 and a minor accident that occurred a year earlier in 1994 and involved no lost time.

Steven Zadach, the President of the Georgia Stevedore Association (GSA), testified that GSA enforces the union contract between the ILA and the maritime employers, that a drug policy governing longshore workers went into effect on December 1, 1990, that under the terms of that policy, longshore workers are subject to being tested for drugs when accidents occur or property damage occurs and that that drug policy was initiated because "it was recognized by both parties that drugs and alcohol abuse had become a very big problem in the industry and both sides recognized that something had to be done to control it." A procedure is in place and when a drug test is requested, a urine test is performed. If a test is positive, an employee is suspended for ninety (90) days. The employee is then permitted to return to work, but is subject to random testing. In the event a longshore worker fails a second drug test, the employee is permanently suspended from the industry. (RX 6 at 5-8, 9)

Mr. Zadach testified, and tendered as an exhibit to his deposition, a drug test verifying that Claimant tested positive for cocaine and marijuana on July 20, 1994. Mr. Zadach's file also included evidence of a second positive drug screen on July 21, 1994, following the Cooper/T.Smith accident. As a result of those tests, Mr. Zadach immediately contacted Thomas Holland, the President of the ILA in Brunswick, advising him of Claimant's suspension effective July 23, 1994. The drug policy does provide for a retest, which Claimant never requested. Mr. Zadach testified that since the 1994 suspension, he is unaware of any effort by

Claimant to return to work. On January 9, 1995, Mr. Zadach asked Claimant to appear for a random drug test. However, he did not appear for a drug test at that time. He was again requested to give a random drug test on February 2, 1996 and he tested positive again for cocaine and marijuana and therefore has been permanently suspended from employment as a longshoreman effective February 2, 1996. He has made no attempt to be reinstated as a longshoreman. Mr. Zadach testified that Mr. Brunson has in fact retired from the industry effective January, 1997. (RX 6 at 12-15; Deposition Exhibit 2)

Other non-medical evidence consisted of Claimant's responses to interrogatories. In his interrogatory responses, the Claimant stated that his back and legs did not start to hurt until six months after the July 20, 1994 accident, which is why he was only seeking benefits effective January 1, 1995. This conflicts directly with the Claimant's testimony that he felt he was having problems by August, 1994. In his interrogatory answers, he acknowledges a conviction for possession of drugs, which was also in conflict with his hearing testimony. In response #20, he claims that he was not aware he had a claim until January, 1995. This is also inconsistent with his hearing testimony. (RX 13 at 7-10)

Medical evidence was introduced in the form of both medical reports and medical depositions and these will be summarized at this point.

Glynn Immediate Care. On July 20, 1994, Claimant was treated at Glynn Immediate Care. He complained only of pain to his left shoulder. He also reported that he was out of blood pressure medicine and he was given a prescription for Procardia, apparently based on his previous chart. I note that his chart showed previous visits to Glynn Immediate Care on January 22, 1993, when he was treated for high blood pressure and was prescribed Procardia. On October 3, 1992, he was treated for a hand injury, but was also prescribed Procardia. On September 30, 1992, he was treated for a fractured right hand and on March 21, 1992, he was treated for a finger injury, but was noted to have high blood pressure and was also prescribed Procardia. Claimant was apparently written prescriptions for Procardia on virtually every visit to Glynn Immediate Care, regardless of the purpose for the visit. Mr. Brunson's visit to Glynn Immediate Care on July 20, 1994 specifically excludes any mention of neck or back pain. (RX 1 at 1-6)

Dr. Robert H. Thompson. Long before his treatment at Glynn Immediate Care, Claimant was a patient of Dr. Thompson, an internist in Brunswick. Dr. Thompson testified that his first

documented treatment of Claimant was in April, 1983, although there could have been previous treatment since Dr. Thompson has purged some of his records. That treatment was for a strain of his right foot and left wrist, a job injury that had occurred with Palmetto Street Company. Claimant was injured when he loaded soybean bags onto a barge. Dr. Thompson not only treated the job injury, but also was treating him for other medical problems in 1983. His report of April 4, 1983 reflects medication including Indocin, which is an anti-inflammatory, prescriptions for Dyazide and Lopressor, in April, 1993. These are medications for high blood pressure. Claimant was released to return to work because of the April 4, 1983 foot injury on May 9, 1983. (RX 2 at 2-7, RX 10 at 9-11)

Claimant returned to Dr. Thompson in May, 1985, again as the result of a job injury, but also seeking treatment for high blood pressure. His blood pressure at that time seemed to be "moderately controlled," according to Dr. Thompson. Dr. Thompson did not know what treatment Claimant received between 1983 and 1985. The blood pressure medication prescribed in 1985 included Dyazide. He was also prescribed Clinoril, an anti-inflammatory, and Tenormin, a beta blocker used for hypertension. On May 14, 1985, Claimant was hospitalized. His admitting diagnosis, according to Dr. Thompson, was high blood pressure. Follow-up treatment in 1985 continued through approximately May 24, 1985. Prescriptions included Dyazide, Tenormin, Clinoril and Indocin. (RX 2 at 13-15, RX 10 at 10-13)

Claimant did not return to Dr. Thompson until December, 1988, at which time he presented for an eye infection, but continued follow-up treatment for high blood pressure and was prescribed Procardia. Dr. Thompson testified that he did not know whether Claimant was seen by any other physician during that three-year gap. He was not seen by Dr. Thompson again until 1992. At the time, his blood pressure was elevated at 200/130. Dr. Thompson continued to treat the elevated blood pressure with Procardia. (RX 2 at 16, RX 10 at 14-15)

Dr. Thompson was also concerned about the Claimant's sleep apnea, a condition caused by a nasal obstruction. Patients who are diagnosed with sleep apnea are encouraged not to use any drug of any kind, including alcohol, due to the sedative effect thereof. Dr. Thompson testified that his next visit with Claimant was not until 1996, although in the interim, Dr. Thompson learned that Claimant was being treated by Dr. Enrique Martinez, a cardiologist, who was treating conditions including hypertension, congestive heart failure and acute pulmonary edema. (RX 10 at 17-18, 21)

On December 23, 1996, Claimant presented to Dr. Thompson on multiple medications including heart and high blood pressure medicine. Claimant was complaining of severe right upper quadrant pain that had begun the previous day after partying. No mention was made of any back, shoulder or neck pain or of anything having to do with any injury. He reported to Dr. Thompson that he had been at a party the previous Saturday night, and that he had been smoking and drinking. Dr. Thompson hospitalized him and diagnosed diverticulitis, and again Claimant did not relate this treatment to any injuries or trauma, although Dr. Thompson specifically asked him about injuries. (RX 10 at 23-28)

Dr. Thompson testified that at no time during his treatment did Claimant relate that he had been involved in an accident in 1994. At no time did he mention his injury to Dr. Thompson. At no time did he make any complaints of neck or back pain. On December 23, 1996, Dr. Thompson signed an Examining Physician's Statement wherein the doctor attributed Claimant's disability to acute abdominal pain, diverticulitis, alcoholism, smoke abuse, hypertension, diabetes and cardiomyopathy. Again there is no mention of any job injury. Dr. Thompson also testified that he could not relate any of the symptoms that he has treated since 1994, including hypertension, pulmonary edema and sleep apnea, to the accident of July 20, 1994. Dr. Thompson, who pointed out that he did not treat Claimant in 1994, opined that the problems that he treated were not related to the bump by the forklift. (RX 10 at 33-41, RX 2 at 1)

Charter Hospital. Other pertinent medical evidence includes the records from Charter-By-The-Sea, where the Claimant admitted himself on July 22, 1994. At the time of his admission, the Claimant reported to his physician prolonged daily and frequent use of alcohol, marijuana and cocaine. At the time of his admission on July 22, 1994, he was mildly intoxicated. He admitted to the physician that he smoked two marijuana cigarettes on the day of his admission to Charter, and had last used cocaine two days earlier, which would have been the date of injury. This conflicts with Claimant's hearing testimony. Also at the time of his admission, he was noted to have hypertension, and pain in his feet from arthritis. While the admission history and physical examination report did reference his July 20, 1994 injury and subjective complaints about arm and shoulder pain, his physical examination was normal, specifically the examination of his extremities and his neurological exam. His admission diagnoses make no reference to his arm and shoulder symptoms. (RX 3 at 17-20)

After approximately two days in Charter-By-The-Sea, the Claimant was transferred to Southeast Georgia Regional Medical

Center (SEGRMC) after he had developed respiratory distress and congestive heart failure. He was re-admitted to Charter on August 1, 1994 and he was discharged again on August 19, 1994. During this SEGRMC hospitalization, Dr. Martinez noted that Claimant was not following his diet, and was generally poorly compliant. He also continued to smoke. He was discharged from Charter-By-The-Sea on medications including Hydrochlorothiazide, Lotesin, Calan, and Procardia. He was urged to attend AA and NA meetings, and to follow-up with Dr. Martinez. It is noteworthy that even when Claimant was re-admitted to Charter on August 1, 1994 after his SEGRMC hospitalization, he still tested positive for marijuana. (RX 3 at 15-16)

Dr. Enrique Martinez. Much of the Claimant's medical treatment since 1993 has been rendered by Dr. Enrique Martinez, a Board Certified cardiologist in Brunswick. Dr. Martinez, who still is Claimant's current and primary physician, first treated him in June, 1993 when he was admitted to SEGRMC for severe hypertension and congestive heart failure. At the time of this hospital admission, his blood pressure was 239/113 and his symptoms included shortness of breath, swelling of his legs and extreme fatigue. Claimant was advised to stay off work, not smoke or drink alcohol. He was discharged on a diabetic diet and on medication including aspirin, Magnesium Chloride, Zyloprim, Lanoxin, Capoten and Norvasc, all for his heart condition and high blood pressure. According to the hospital reports, at the time of admission, Claimant had a two-year history of hypertension, but had not taken medicine despite professional advice to do so. (RX 4 at 1-5, RX 11 at 7-8)

Dr. Martinez described congestive heart failure as a "state in which the heart is unable to contract and relax properly, producing the accumulation of fluid in his lungs, primarily causing what we call pulmonary edema." Dr. Martinez testified that when the symptoms last more than a few days, swelling of the lower extremities occurs, a condition which did not happen in 1994. Claimant's complaints were primarily of shortness of breath and coughing. (RX 11 at 8) Dr. Martinez noted that Claimant has a long history of non-compliance with his recommended course of treatment and at the time of the 1993 hospitalization, he had been ill for at least two years and not taking medication. (**Id.** at 9)

Dr. Martinez also testified that congestive heart failure can be caused by multiple conditions. In Claimant's case, he attributed it to uncontrolled high blood pressure. Diabetes could have been a contributor, the doctor concluding that Claimant's cigarette smoking did not help his condition. (RX 11 at 10-11)

During his 1993 hospitalization, it is noteworthy that Claimant was observed smoking in the hospital bathroom on June 12, 1993. (RX 4 at 35, 46)

Claimant's older hospital reports show several documented incidents of high blood pressure. He was treated in the emergency room on April 23, 1988 for a severe laceration. He was intoxicated and his blood pressure was 190/144. He was treated in the emergency room on March 19, 1988. His blood pressure was 160/110. He had been driving while intoxicated. (RX 4 at 71)

Dr. Martinez testified that he followed Claimant in his office following the 1993 hospitalization, and rendered him disabled from work. According to Dr. Martinez, "I don't remember him being a model of compliance, keeping appointments, following instructions, no. He has not done that." In many of the approximately 83 pages of office notes that have been generated since 1993, Dr. Martinez made reference to the fact that Claimant was still smoking (RX 5-83), was not taking his medication (RX 5-82), and also failed to show for appointments. (RX 5-80) He continued to drink alcohol. (RX 5-79) He expressed an interest in returning to work in September, 1993 (RX 5-76, but Dr. Martinez would not release him to work and he remained disabled until late 1993. He was asked by Dr. Martinez to regularly monitor his blood pressure, which he did not always do. (RX 5-67)

Dr. Martinez testified, and his records reflect, that he permitted Claimant to return to work following an office visit on or about December 6, 1993. He was urged to quit smoking and quit drinking and was told to return to the office in one week. Claimant failed to show for appointments with Dr. Martinez on December 6, 1993 and on January 31, 1994. In fact, he did not return to Dr. Martinez's office until after his discharge from Charter. Even after he was permitted to return to work, he was noted to be drinking, not taking his medication and smoking. Dr. Martinez tried to encourage him to get off these deleterious substances, and get on his medication and control his diet, but Claimant was still not compliant. (RX 5 at 60, RX 11 at 11-13)

When first seen in follow-up with Dr. Martinez following the 1994 hospitalization at Charter, Claimant's blood pressure was extremely high, 240/120. Most noteworthy is the fact that the office notes for August, 1994 make absolutely no reference to any job injury. (RX 5-55 to RX 5-58) To the contrary, however, they make reference to cocaine use, to non-compliance with diet, and to the patient's knowledge that he needs to change his lifestyle. In fact, Dr. Martinez's medical reports from August, 1994 through August 29, 1996 make absolutely no reference to any job injury.

The Claimant was seen more than 50 times during this interval. He did complain about other medical problems including respiratory infections and dysfunction, but there is no mention of any back, neck, shoulder or leg pain. On August 28, 1996, Dr. Martinez specifically reported that Claimant's forklift accident "is highly unlikely to cause heart failure." (RX 5 at 55-58)

Dr. Martinez elaborated on his opinions in his deposition where he testified forthrightly that the most likely causes for the heart failure are "high blood pressure, diabetes control, smoking and others," and the doctor refused to provide a letter in support of Claimant's compensation claim. Dr. Martinez also testified that he did not recall any other discussions about any injury on the job before August 28, 1996 and he testified "I have always told him, Jeremiah, this is not produced by trauma. This is produced by other illnesses you have to face." (RX 11 at 23-26)

Dr. Martinez testified that Claimant was unable to work in 1994 because of his diabetes and uncontrolled high blood pressure. Dr. Martinez also testified that the blood pressure reading recorded at Glynn Immediate Care on July 20, 1994 was not related in any way to the forklift accident. Dr. Martinez also authored a social security disability report dated May 18, 1995, in which he based Claimant's disability on "severe hypertension, congestive heart failure, alcoholism and drug addiction. In no way do I mention the shoulder or back problems as part of or aggravating or causing or producing." Dr. Martinez noted that if the complaints of shoulder and back pain had been of any significance, he would have referred Claimant to an orthopedic surgeon. (RX 11 at 23-27, 32)

Dr. Martinez again specifically testified that in Claimant's case, an episode of intense, severe pain, resulting from a traumatic injury, did not cause his congestive heart failure.

This closed record also contains the transcripts of the deposition testimony of Dr. Wilbur Brown, a chiropractor, and Dr. Steven Pappas, a neurologist. Dr. Brown, who does not have a medical degree, testified that his opinion as to Claimant's disability was based solely on Claimant's subjective complaints and on no other information. Dr. Brown testified that his opinion could change if different facts were brought to his attention and, most important, Dr. Brown knew nothing about the reasons that Claimant stopped working. (RX 14 at 19-22)

Dr. Pappas, a neurologist, testified that he examined Claimant and had an MRI performed. The history given to Dr. Pappas was persistent shoulder, low back and hip pain. Dr. Pappas, who based

his opinions on what the Claimant told him, testified that the MRI scan that was performed showed some degenerative disc disease. The findings on the MRI, however, were not indicative of any trauma. Dr. Pappas testified that if Claimant's condition did result from trauma, he would have expected the pain to develop within days or possibly weeks of a trauma and that it would be highly unusual for the pain to develop six months or one year after trauma. (RX 15 at 5-9, 15, 16)

On January 5, 2001 I issued a **Decision and Order On Remand - Denying Benefits** as I concluded that Claimant had not established a work-related injury or any disability causally related thereto. Claimant timely appealed from said decision and the Benefits Review Board, by **Decision and Order** dated January 30, 2002, reversed and vacated the denial of benefits and remanded the matter to this Administrative Law Judge for reconsideration of the evidence pursuant to its directions.

As there is a significant dispute as to exactly what aspects of the claim were affirmed by the BRB, **i.e.**, the "Law of the Case," and what issues were remanded to me for reconsideration, I shall now quote liberally from the Board's Non-Published decision to put this matter in proper perspective for the benefit of the parties and for reviewing authorities.[2]

"On appeal, claimant contends that the administrative law judge failed to follow the Board's instructions on remand with respect to whether employer rebutted the Section 20(a) presumption, failed to apply the correct standard for rebuttal when addressing that issue and, lastly, that the administrative law judge's factual findings regarding the cause of claimant's cardiac and shoulder conditions are not supported by substantial evidence. Employer responds, urging affirmance of the administrative law judge's denial of benefits.

"It is well-established that once the Section 20(a) presumption has been invoked, as in this case, the burden shifts to the employer ro rebut the presumption with substantial evidence that claimant's condition was not caused or aggravated by his employment. **See Brown v. Jacksonville Shipyards, Inc.**, 893 F.2d

[2]This is another of my decision where the Board has clearly usurped my role as the fact-finder and substituted its opinions for those of two judges - Judge Murty who presided over the hearing and the undersigned who thoroughly reviewed and analyzed all of the evidence. This is another example of how difficult it is, at least for this Administrative Law Judge, to have the Board affirm a denial of benefits under the Longshore Act.

394, 23 BRBS 22 (CRT)(11th Cir. 1990); **see also DelVecchio v. Bowers**, 296 U.S. 280 (1935); **American Grain Trimmers v. Director, OWCP**, 181 F.3d 810, 33 BRBS 71 (CRT)(7th Cir. 1999); **Bath Iron Works Corp. v. Director, OWCP**, 109 F.2d 53, 31 BRBS 19 (CRT)(1st Cir. 1997). Where aggravation of a pre-existing condition is at issue, employer must establish that work events neither directly caused the injury nor aggravated the pre-existing condition resulting in injury. **O'Kelley v. Dep't of the Army/NAF**, 34 BRBS 39 (2000). If the administrative law judge finds that the Section 20(a) presumption is rebutted, the presumption no longer controls, and the administrative law judge must weigh all of the evidence and resolve the causation issue based on the record as a whole. **See Brown**, 893 F.2d 294, 23 BRBS 22 (CRT); **see also Director, OWCP v. Greenwich Collieries**, 512 U.S. 257, 28 BRBS 43 (CRT)(1994).

"In this case, the administrative law judge did not follow precisely the analysis as set forth in the preceding discussion in that he did not explicitly identify the evidence upon which he relied to find that employer met its burden of rebutting the Section 20(a) presumption. Rather, the administrative law judge first, summarily found the presumption rebuffed, next, engaged in a discussion of all the record evidence, and finally, found neither claimant's cardiac nor shoulder conditions[3] to be causally related to his employment. Despite the administrative law judge's omission of the specific evidence supporting rebuttal of the Section 20(a), his discussion of the evidence relevant to the causation issue provides an adequate basis for our review of is decision. **Gooden v. Director, OWCP**, 135 F.3d 1066, 1068, 32 BRBS 59, 61 (CRT)(5th Cir. 1998).

"In challenging the administrative law judge's determination that claimant's cardiac and shoulder conditions are unrelated to his employment, claimant first avers that the administrative law judge erred as a matter of law in failing to apply the 'ruling out' standard for rebuttal of the Section 20(a) presumption. As noted by claimant on appeal, the United States Court of Appeals for the Eleventh Circuit, within whose jurisdiction this claim arises, has adopted a 'ruling out' standard when addressing the issue of rebuttal of the Section 20(a) presumption. **See Brown**, 893 F.2d 294, 23 BRBS 22 (CRT). In **Brown**, the court found that the Act placed on employer the duty of rebutting the Section 20(a) presumption with evidence that the employee's employment neither caused nor aggravated his harm. Where none of the physicians of

[3]The Board has already held that Claimant's alleged back and cardiac condition cannot be revisited by this Administrative Law Judge at this time.

record expressed an opinion ruling out a causal connection, the court determined that there was no concrete evidence sufficient to rebut the presumption. **Id.**, 893 F.2d at 297, 23 BRBS at 24 (CRT); **cf. Conoco, Inc. v. Director, OWCP [Prewitt]**, 194 F.3d 684, 33 BRBS 187 (CRT)(5th Cir. 1999) (court rejects 'ruling out' standard, but affirms finding Section 20(a) was not rebutted); **Bath Iron Works Corp. v. Director, OWCP [Shorette]**, 109 F.2d 53, 31 BRBS 19 9CRT)(1st Cir. 1997) (employer need not 'rule out' any possible causal relationship; employer must proffer substantial evidence that the condition was not caused or aggravated by the employment). Under this standard, it is sufficient if a physician unequivocally states, to a reasonable degree of medical certainty, that the harm is not related to the employment. **Jones v. Aluminum Company of America**, 35 BRBS 37, 40 (2001); **O'Kelley**, 34 BRBS at 4 1-42.

"The administrative law judge's Decision and Order in the instant case contains a lengthy recitation of the case law relevant to Section 20(a) rebuttal in which the administrative law judge, having misidentified this case as arising within the jurisdiction of the United States Court of Appeals for the First Circuit, summarizes the First Circuit's decision in **Shorette** rejecting the 'ruling out' standard. **See** Decision and Order at 15. Also included in the administrative law judge's discussion of Section 20(a) rebuttal case law is the statement that, on rebuttal, employer is required to produce evidence which completely 'rules out' the causal connection between the claimant's condition and his employment. **See** Decision and Order at 16. This lack of certainty as to the legal standard for rebuttal actually employed by the administrative law judge, however, does not preclude us from deciding, consistent with the applicable legal standards whether the administrative law judge's determination that there is no causal relationship between claimant's conditions and his employment is rational and supported by substantial evidence.

"In undertaking this review, we consider, first, whether the administrative law judge's determination that claimant's cardiac condition is not causally related to his employment is supported by substantial evidence and in accordance with law. The administrative law judge relied on the opinion of Dr. Martinez, claimant's treating cardiologist, to conclude that claimant's cardiac condition is not work-related. Having set forth at length and considered the totality of Dr. Martinez's testimony, the administrative law judge found that his opinion establishes conclusively that claimant's cardiac condition was neither caused nor aggravated by his work-related accident. **See** Decision and Order 2 1-22. It is well established that the administrative law judge, as factfinder, must independently analyze and discuss the medical evidence before him. **See O'Kelley**, 34 BRBS at 42. In so

doing, the administrative law judge is entitled to evaluate the credibility of all witnesses and to draw his own inferences from the evidence. **Id.**; **see also Mendoza v. Marine Personnel Company, Inc.**, 46 F.3d 498, 29 BRBS 79 (CRT)(5th Cir. 1995).

"In arguing that the administrative law judge erroneously found Dr. Martinez's opinion sufficient to rebut the Section 20(a) presumption, claimant notes that physician's deposition testimony as to the theoretical possibility that pain resulting from trauma could worsen a preexisting heart condition. See C1. P/R at 18; RX 11 at 34. We do not agree that the testimony of Dr. Martinez cited by claimant renders his opinion insufficient to rebut the Section 20(a) presumption. Although Dr. Martinez did acknowledge the theoretical possibility that severe pain could worsen a pre-existing cardiac condition, his testimony, considered in its entirety, reflects his belief that such a scenario did not, in fact, occur in the instant case. **See** RX 11 at 18-19, 24-25, 27-34, 43; **see also** RX 5. As Dr. Martinez's reports and deposition testimony unequivocally express his opinion, rendered within a reasonable degree of medical certainty, that claimant's cardiac condition was neither caused nor aggravated by his work-related accident, his opinion is sufficient to meet employer's burden on rebuttal. **See Brown**, 893 F.2d 294, 23 BRBS 22 (CRT); **Jones**, 35 BRBS at 40; **O'Kelley**, 34 BRBS at 4 1-42. As the administrative law judge rationally credited Dr. Martinez's testimony, and as the record contains no medical evidence of a causal relationship between claimant's cardiac condition and his work-related accident, we affirm the administrative law judge's conclusion that a causal connection between claimant's cardiac condition and his employment has not been established based upon the record as a whole. **See Brown**, 893 F.2d 294, 23 BRBS 22 (CRT); **see also Greenwich Collieries**, 512 U.S. 267, 28 BRBS 43 (CRT); **Holmes v. Universal Maritime Service Corp.**, 29 BRBS 18 (1995).

"We next consider claimant's contention that the administrative law judge erred in finding that claimant's left shoulder condition is not causally related to his work injury. We agree with claimant that because the factual findings made by the administrative law judge with respect to claimant's shoulder condition are not supported by substantial evidence, the administrative law judge's conclusion that the shoulder condition is not employment-related cannot be affirmed. Specifically, the administrative law judge, having discredited claimant's testimony, found that the record contained no evidence that claimant sought treatment or complained about his left shoulder subsequent to the treatment that he received at Glynn Immediate Care on the date of his accident until nearly two years after his injury when he first complained to Dr. Martinez. **See** Decision and Order at 21; **see also**

Decision and Order at 4, 9, 12, 20, 24, 27. Contrary to the administrative law judge's finding, the medical reports of record dating from the time of claimant's accident through the following two years do in fact contain references to claimant's left shoulder injury and complaints of shoulder pain.[4] The administrative law judge further found that any shoulder complaints from the July 20, 1994, work accident had resolved by the day after claimant's accident when he returned to work for another stevedoring employer. **See** Decision and Order at 20. However, contrary to the administrative law judge's statement that Glynn Immediate Care released claimant to return to work without restrictions, the records from claimant's treatment at Glynn reflect that claimant was released to return to work the following date with a lifting restriction of 20 pounds to continue through July 24, 1994. **See** CX 1. Moreover, the administrative law judge's finding that claimant successfully performed "physically demanding" work on July 21, 1994, **see** Decision and Order at 20, 23, 28, is not supported by the record evidence which indicates that claimant's duties on that date consisted solely of driving cars off a ship.[5] **See** Tr. at 27, 48-49, 64-66.

"In concluding that claimant's shoulder condition is unrelated to his employment, the administrative law judge found that the July 20, 1994 work accident was 'relatively minor.' **See** Decision and Order at 20, 28. The severity of the work-related incident, however, is not determinative of whether an aggravation occurred since even a minor incident can aggravate a pre-existing condition and impair a claimant's ability to work. **See, e.g., Foundation Constructors, Inc. v. Director, OWCP**, 950 F.2d 621, 2-5 BRBS 71 (CRT)(9th Cir. 1991). Whether the circumstances of a claimant's employment combine with the pre-existing condition so as to

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[4]In this regard, the history and physical examination report by Charter By-the-Sea Hospital dated July 23, 1994, refers to claimant's work injury and shoulder pain. CX 4; RX 3 at 17. During a subsequent hospitalization at Charter By-the-Sea, Dr. Harris, on August 10, 1994, diagnosed claimant with subacromial bursitis of his left shoulder baesd on clinical exam. CX 4; see also RX 3 at 3. A report from Southeast Georgia Regional Medical Center reflects that claimant reported to the emergency room on November 21, 1994, with a complaint of left shoulder pain and contains a diagnoses of left shoulder strain and bursitis. CX 5. Lastly, contrary to the administrative law judge's finding that claimant first complained about his shoulder to Dr. Martinez two years after his July 20, 1994 accident, Dr. Martinez's records of office visits on December 2, 1994 and May 2, 1995 report claimant's complaints of shoulder pain. CX 16, RX 5 at 43; RX 11 at 35-41.

[5]In this regard, **see** footnote 1, above.

increase his symptoms to such a degree as to incapacitate him for any period of time or whether they actually alter the underlying process is not significant. **See Gooden**, 135 F.3d 1066, 32 BRBS 59 (CRT); **Gardner v. Director, OWCP**, 640 F.2d 1385, 13 BRBS 101 (1st Cir. 1981), **aff'g** 11 BRBS 561 (1971).

"We therefore vacate the administrative law judge's determination that claimant's shoulder condition is unrelated to his employment and remand the case for reconsideration of the evidence relevant to the cause of claimant's shoulder condition in light of the applicable principles regarding aggravation of a pre-existing condition. **See Brown**, 893 F.2d 294, 23 BRBS 22 (CRT). Once again, the administrative law judge, on remand, must accord claimant the benefit of the Section 20(a) presumption of causation with regard to his shoulder injury. On rebuttal, the administrative law judge must consider the evidence supporting the employer's position and specifically discuss whether employer has produced substantial evidence to meet its rebuttal burden. **See, e.g.**, **Gooden**, 135 F.3d 1066, 32 BRBS 59 (CRT); **see also Brown**, 893 F.2d 294, 23 BRBS 22 (CRT).[6] If employer is found to have met this burden, the presumption drops from the case and the administrative law judge must decide the causation issue based on the evidence considered as a whole, with claimant bearing the ultimate burden of persuasion. **See Brown**, 893 F.2d 294, 23 BRBS 22 (CRT); **see also Greenwich Collieries**, 512 U.S. 267, 28 BRBS 43 (CRT). In addition,

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[6]The administrative law judge additionally engaged in a lengthy discussion of the case law pertaining to intervening events. **See** Decision and Order at 24-27. He then concluded that claimant's lifestyle, or intentional misconduct, constituted an intervening cause breaking the chain of causality between claimant's work-related injury and his present medical condition. Decision and Order at 27. The decisions cited by the administrative law judge relate to cases in which an intervening event occurs between the initial work-related injury and a subsequent injury; in such an instance, a claimant may not recover if the remote consequences of his work injury are the direct result of his intentional post-injury misconduct, and are only the indirect, unforeseeable result of the work-related injury. **See Jackson v. Strachan Shipping Co.**, 32 BRBS 71, 73 (1998) (Smith, J., concurring and dissenting). In the instant case, the administrative law judge did not find that a specific nonwork-related event followed claimant's work accident. Rather, the administrative law judge found that claimant's 'lifestyle for many years, pre-injury and post-injury, was an intervening cause. . .' Decision and Order at 27. The administrative law judge, however, failed to cite medical evidence that claimant's present shoulder condition is the direct result of his 'lifestyle.' **See Jackson**, 32 BRBS at 73. His determination severed the causal relationship between claimant's work accident and his present shoulder condition, therefore, cannot be affirmed.

if claimant's shoulder condition is work-related, the administrative law judge must award Section 7(a), 33 U.S.C. §907(a), benefits for medical treatment reasonable and necessary for he treatment of the condition. Even where a claimant is not entitled to disability benefits, employer still may be liable for medical benefits for a work-related injury. **See Ingalls Shipbuilding, Inc. v. Director, OWCP [Baker]**, 991 F.2d 163, 27 BRBS 14 (CRT)(5th Cir. 1993). Lastly, if the administrative law judge finds a causal relationship between claimant's shoulder condition and his employment, he must consider the nature and extent of claimant's work-related disability.[7]

"Accordingly, the administrative law judge's Decision and Order on Remand is affirmed in part and vacated in part, and the case is remanded for further consideration consistent with this decision."

Brunson, Decision and Order, pp 5-16)

The Findings of Fact and Conclusions of Law made in the decisions issued on March 5, 1998 by Judge Murty and on January 5, 2001 by the undersigned, to the extent not disturbed by the Board, are binding upon the parties as the Law of the Case, pending appellate review, are incorporated herein by reference as if stated **in extenso** and will be reiterated herein only for purposes of clarity and to deal with the Board's directions.

The record was docketed at the Boston District and on May 9, 2002, this Court (1) advised the parties of such docketing, (2) gave them thirty (30) days to resolve the matter voluntarily, especially in view of the board's directions and (3) failing that, an additional thirty (30) days to file briefs on the issues mandated by the Board. (ALJ EX C)

As the parties did not settle this matter, Claimant's initial brief was filed prematurely on June 14, 2002. (CX F) The Employer's brief was timely filed on July 12, 2002, (RX A) and Claimant filed a reply brief on July 17, 2002. (CX G) As such reply brief was not authorized, Employer's counsel was given an additional ten (10) days to file a response thereto by **ORDER** issued July 19, 2002. (ALJ EX D) The response brief was filed August 5,

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[7]Claimant is entitled to disability benefits for any period his work injury causes a total or partial loss of wage-earning capacity. **See generally Shell Offshore v. Director, OWCP**, 122 F.3d 321, 31 BRBS 129 (CRT)(5th Cir. 1997); Johnson v. Newport News Shipbuilding & Dry Dock Co., **25 BRBS 340 (1992).**

2002. (RX B) The record is now closed and is ready for a decision in accordance with the Board's directions.

Additional Findings of Fact and Conclusions of Law

This Administrative Law Judge, in arriving at a decision in this matter, is entitled to determine the credibility of the witnesses, to weigh the evidence and draw his own inferences from it, and he is not bound to accept the opinion or theory of any particular medical examiner. **Banks v. Chicago Grain Trimmers Association, Inc.**, 390 U.S. 459 (1968), **reh. denied**, 391 U.S. 929 (1969); **Todd Shipyards v. Donovan**, 300 F.2d 741 (5th Cir. 1962); **Scott v. Tug Mate, Incorporated**, 22 BRBS 164, 165, 167 (1989); **Hite v. Dresser Guiberson Pumping**, 22 BRBS 87, 91 (1989); **Anderson v. Todd Shipyard Corp.**, 22 BRBS 20, 22 (1989); **Hughes v. Bethlehem Steel Corp.**, 17 BRBS 153 (1985); **Seaman v. Jacksonville Shipyard, Inc.**, 14 BRBS 148.9 (1981); **Brandt v. Avondale Shipyards, Inc.**, 8 BRBS 698 (1978); **Sargent v. Matson Terminal, Inc.**, 8 BRBS 564 (1978).

The Act provides a presumption that a claim comes within its provisions. **See** 33 U.S.C. §920(a). This Section 20 presumption "applies as much to the nexus between an employee's malady and his employment activities as it does to any other aspect of a claim." **Swinton v. J. Frank Kelly, Inc.**, 554 F.2d 1075 (D.C. Cir. 1976), **cert. denied**, 429 U.S. 820 (1976). Claimant's uncontradicted credible testimony alone may constitute sufficient proof of physical injury. **Golden v. Eller & Co.**, 8 BRBS 846 (1978), **aff'd**, 620 F.2d 71 (5th Cir. 1980); **Hampton v. Bethlehem Steel Corp.**, 24 BRBS 141 (1990); **Anderson v. Todd Shipyards**, **supra**, at 21; **Miranda v. Excavation Construction, Inc.**, 13 BRBS 882 (1981).

However, this statutory presumption does not dispense with the requirement that a claim of injury must be made in the first instance, nor is it a substitute for the testimony necessary to establish a "**prima facie**" case. The Supreme Court has held that "[a] **prima facie** 'claim for compensation,' to which the statutory presumption refers, must at least allege an injury that arose in the course of employment as well as out of employment." **United States Indus./Fed. Sheet Metal, Inc., v. Director, Office of Workers' Compensation Programs, U.S. Dep't of Labor**, 455 U.S. 608, 615 102 S. Ct. 1318, 14 BRBS 631, 633 (CRT) (1982), **rev'g Riley v. U.S. Indus./Fed. Sheet Metal, Inc.**, 627 F.2d 455 (D.C. Cir. 1980). Moreover, "the mere existence of a physical impairment is plainly insufficient to shift the burden of proof to the employer." **U.S. Industries/Federal Sheet Metal, Inc., et al., v. Director, Office**

of Workers' Compensation Programs, U.S. Department of Labor, 455 U.S. 608, 102 S.Ct. 1318 (1982), **rev'g Riley v. U.S. Industries/Federal Sheet Metal, Inc.**, 627 F.2d 455 (D.C. Cir. 1980). The presumption, though, is applicable once claimant establishes that he has sustained an injury, **i.e.**, harm to his body. **Preziosi v. Controlled Industries**, 22 BRBS 468, 470 (1989); **Brown v. Pacific Dry Dock Industries**, 22 BRBS 284, 285 (1989); **Trask v. Lockheed Shipbuilding and Construction Company**, 17 BRBS 56, 59 (1985); **Kelaita v. Triple A. Machine Shop**, 13 BRBS 326 (1981).

To establish a **prima facie** claim for compensation, a claimant need not affirmatively establish a connection between work and harm. Rather, a claimant has the burden of establishing only that (1) the claimant sustained physical harm or pain and (2) an accident occurred in the course of employment, or conditions existed at work, which could have caused the harm or pain. **Kelaita**, **supra**; **Kier v. Bethlehem Steel Corp.**, 16 BRBS 128 (1984). Once this **prima facie** case is established, a presumption is created under Section 20(a) that the employee's injury or death arose out of employment. To rebut the presumption, the party opposing entitlement must present substantial evidence proving the absence of or severing the connection between such harm and employment or working conditions. **Kier**, **supra**; **Parsons Corp. of California v. Director, OWCP**, 619 F.2d 38 (9th Cir. 1980); **Butler v. District Parking Management Co.**, 363 F.2d 682 (D.C. Cir. 1966); **Ranks v. Bath Iron Works Corp.**, 22 BRBS 301, 305 (1989). Once claimant establishes a physical harm and working conditions which could have caused or aggravated the harm or pain the burden shifts to the employer to establish that claimant's condition was not caused or aggravated by his employment. **Brown v. Pacific Dry Dock**, 22 BRBS 284 (1989); **Rajotte v. General Dynamics Corp.**, 18 BRBS 85 (1986). If the presumption is rebutted, it no longer controls and the record as a whole must be evaluated to determine the issue of causation. **Del Vecchio v. Bowers**, 296 U.S. 280 (1935); **Volpe v. Northeast Marine Terminals**, 671 F.2d 697 (2d Cir. 1981). In such cases, I must weigh all of the evidence relevant to the causation issue. **Sprague v. Director, OWCP**, 688 F.2d 862 (1st Cir. 1982); **MacDonald v. Trailer Marine Transport Corp.**, 18 BRBS 259 (1986).

The U.S. Court of Appeals for the First Circuit has considered the Employer’s burden of proof in rebutting a **prima facie** claim under Section 20(a) and that Court has issued a most significant decision in **Bath Iron Works Corp. v. Director, OWCP (Shorette)**, 109 F.3d 53, 31 BRBS 19 (CRT)(1st Cir. 1997).

In **Shorette**, the United States Court of Appeals for the First

Circuit held that an employer need not rule out any possible causal relationship between a claimant's employment and his condition in order to establish rebuttal of the Section 20(a) presumption. The court held that employer need only produce substantial evidence that the condition was not caused or aggravated by the employment. **Id**., 109 F.3d at 56,31 BRBS at 21 (CRT); **see also Bath Iron Works Corp. v. Director, OWCP [Harford]**, 137 F.3d 673, 32 BRBS 45 (CRT)(1st Cir. 1998). The court held that requiring an employer to rule out any possible connection between the injury and the employment goes beyond the statutory language presuming the compensability of the claim "in the absence of substantial evidence to the contrary." 33 U.S.C. §920(a). **See Shorette,** 109 F.3d at 56, 31 BRBS at 21 (CRT). The "ruling out" standard was recently addressed and rejected by the Court of Appeals for the Fifth and Seventh Circuits as well. **Conoco, Inc. v. Director, OWCP [Prewitt]**, 194 F.3d 684, 33 BRBS 187(CRT)(5th Cir. 1999); **American Grain Trimmers, Inc. v. Director, OWCP**, 181 F.3d 810, 33 BRBS 71(CRT)(7th Cir. 1999); **see also O'Kelley v. Dep't of the Army/NAF**, 34 BRBS 39 (2000);[8] **but see Brown v. Jacksonville Shipyards, Inc.**, 893 F.2d 294, 23 BRBS 22 (CRT)(11th Cir. 1990) (affirming the finding that the Section 20(a) presumption was not rebutted because no physician expressed an opinion "ruling out the possibility" of a causal relationship between the injury and the work).

To establish a **prima facie** case for invocation of the Section 20(a) presumption, claimant must prove that (1) he suffered a harm, and (2) an accident occurred or working conditions existed which could have caused the harm. **See**, **e.g.**, **Noble Drilling Company v. Drake**, 795 F.2d 478, 19 BRBS 6 (CRT) (5th Cir. 1986); **James v. Pate Stevedoring Co.**, 22 BRBS 271 (1989). If claimant's employment aggravates a non-work-related, underlying disease so as to produce incapacitating symptoms, the resulting disability is compensable. **See Rajotte v. General Dynamics Corp.**, 18 BRBS 85 (1986); **Gardner v. Bath Iron Works Corp.**, 11 BRBS 556 (1979), **aff'd sub nom. Gardner v. Director, OWCP**, 640 F.2d 1385, 13 BRBS 101 (1st Cir. 1981). If employer presents substantial evidence sufficient to negate the connection between claimant's harm and his employment, the presumption no longer controls, and the issue of causation must be resolved on the whole body of proof. **See**, **e.g.**, **Leone v. Sealand Terminal Corp.**, 19 BRBS 100 (1986).

Employer contends that Claimant did not establish a **prima facie** case of causation or, in the alternative, that there is

[8]A matter over which this Administrative Law Judge presided in which, most notably, the Board, without prompting by the Court of Appeals for the Fourth Circuit, rejected the "ruling out" standard.

substantial evidence of record to rebut the Section 20(a), 33 U.S.C. §920(a), presumption. The Board has held that Claimant's credible complaints of subjective symptoms and pain can be sufficient to establish the element of physical harm necessary for a **prima facie** case for Section 20(a) invocation. **See Sylvester v. Bethlehem Steel Corp.**, 14 BRBS 234, 236 (1981), **aff'd**, 681 F.2d 359, 14 BRBS 984 (5th Cir. 1982). Moreover, I may properly rely on Claimant's statements to establish that he experienced a work-related harm and when it is undisputed that a work accident occurred which could have caused the harm, the Section 20(a) presumption is invoked in this case. **See**, **e.g.**, **Sinclair v. United Food and Commercial Workers**, 23 BRBS 148, 151 (1989). Moreover, Employer's general contention that the clear weight of the record evidence establishes rebuttal of the pre-presumption is not sufficient to rebut the presumption. **See generally Miffleton v. Briggs Ice Cream Co.**, 12 BRBS 445 (1980).

The presumption of causation can be rebutted only by "substantial evidence to the contrary" offered by the employer. 33 U.S.C. § 920. What this requirement means is that the employer must offer evidence which negates the connection between the alleged event and the alleged harm. In **Caudill v. Sea Tac Alaska Shipbuilding**, 25 BRBS 92 (1991), the carrier offered a medical expert who testified that an employment injury did not "play a significant role" in contributing to the back trouble at issue in this case. The Board held such evidence insufficient as a matter of law to rebut the presumption because the testimony did not negate the role of the employment injury in contributing to the back injury. **See also Cairns v. Matson Terminals, Inc.**, 21 BRBS 299 (1988) (medical expert opinion which did entirely attribute the employee's condition to non-work-related factors was nonetheless insufficient to rebut the presumption where the expert equivocated somewhat on causation elsewhere in his testimony). Where the employer/carrier can offer testimony which negates the causal link, the presumption is rebutted. **See Phillips v. Newport News Shipbuilding & Dry Dock Co.**, 22 BRBS 94 (1988) (medical testimony that claimant's pulmonary problems are consistent with cigarette smoking rather than asbestos exposure sufficient to rebut the presumption).

For the most part only medical testimony can rebut the Section 20(a) presumption. **But see Brown v. Pacific Dry Dock**, 22 BRBS 284 (1989) (holding that asbestosis causation was not established where the employer demonstrated that 99% of its asbestos was removed prior to the claimant's employment while the remaining 1% was in an area far removed from the claimant and removed shortly after his employment began). Factual issues come in to play only in the employee's establishment of the **prima facie** elements of

harm/possible causation and in the later factual determination once the Section 20(a) presumption passes out of the case.

Once rebutted, the presumption itself passes completely out of the case and the issue of causation is determined by examining the record "as a whole". **Holmes v. Universal Maritime Services Corp.**, 29 BRBS 18 (1995). Prior to 1994, the "true doubt" rule governed the resolution of all evidentiary disputes under the Act; where the evidence was in equipoise, all factual determinations were resolved in favor of the injured employee. **Young & Co. v. Shea**, 397 F.2d 185, 188 (5th Cir. 1968), **cert. denied,** 395 U.S. 920, 89 S. Ct. 1771 (1969). The Supreme Court held in 1994 that the "true doubt" rule violated the Administrative Procedure Act, the general statute governing all administrative bodies. **Director, OWCP v. Greenwich Collieries**, 512 U.S. 267, 114 S. Ct. 2251, 28 BRBS 43 (CRT) (1994). Accordingly, after **Greenwich Collieries** the employee bears the burden of proving causation by a preponderance of the evidence after the presumption is rebutted.

As the Employer disputes that the Section 20(a) presumption is invoked, **see Kelaita v. Triple A Machine Shop**, 13 BRBS 326 (1981), the burden shifts to Employer to rebut the presumption with substantial evidence which establishes that claimant's employment did not cause, contribute to, or aggravate his condition. **See Peterson v. General Dynamics Corp**., 25 BRBS 71 (1991), **aff'd sub nom. Insurance Company of North America v. U.S. Dept. of Labor**, 969 F.2d 1400, 26 BRBS 14 (CRT)(2d Cir. 1992), **cert. denied,** 507 U.S. 909, 113 S. Ct. 1264 (1993); **Obert v. John T. Clark and Son of Maryland,** 23 BRBS 157 (1990); **Sam v. Loffland Brothers Co.**, 19 BRBS 228 (1987). The probative testimony of a physician that no relationship exists between an injury and a claimant's employment is sufficient to rebut the presumption. **See Kier v. Bethlehem Steel Corp.**, 16 BRBS 128 (1984). If an employer submits substantial evidence to negate the connection between the injury and the employment, the Section 20(a) presumption no longer controls and the issue of causation must be resolved on the whole body of proof. **Stevens v. Tacoma Boatbuilding Co.**, 23 BRBS 191 (1990). This Administrative Law Judge, in weighing and evaluating all of the record evidence, may place greater weight on the opinions of the employee's treating physician as opposed to the opinion of an examining or consulting physician. In this regard, **see Pietrunti v. Director, OWCP**, 119 F.3d 1035, 31 BRBS 84 (CRT)(2d Cir. 1997). **See also Sir Gean Amos v. Director, OWCP**, 153 F.3d 1051 (9th Cir. 1998), **amended**, 164 F.3d 480, 32 BRBS 144 (CRT)(9th Cir. 1999).

In the case **sub judice**, Claimant again alleges that the harm

to his bodily frame, **i.e.**, his left shoulder and heart condition, resulted from his July 20, 1994 injury at the Employer's maritime facility.

As noted above, the Board held on page 3 of its decision herein as follows:

"Thus, Claimant is entitled as a matter of law to invocation of the Section 20(a) presumption that his shoulder and heart conditions are causally related to his employment. (footnote omitted.) **See, e.g., Frye v. Potomac Electric Co.**, 21 BRBS 194, 196 (1988)."

Thus, as Claimant has invoked the Section 20(a) presumption, I must now consider whether the Employer has established rebuttal of the Section 20(a) presumption with regard to Claimant's shoulder injury and heart condition. As discussed further below in the next section, the Employer has produced substantial evidence severing the connection between Claimant's bodily harm and his maritime employment. Thus, the presumption falls out of the case, does not control the result and I shall now weigh and evaluate all of the record evidence in light of the Board's clear mandate and directions to this Administrative Law Judge.

Injury

The term "injury" means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury. **See** 33 U.S.C. §902(2); **U.S. Industries/Federal Sheet Metal, Inc., et al., v. Director, Office of Workers Compensation Programs, U.S. Department of Labor**, 455 U.S. 608, 102 S.Ct. 1312 (1982), **rev'g Riley v. U.S. Industries/Federal Sheet Metal, Inc.**, 627 F.2d 455 (D.C. Cir. 1980). A work-related aggravation of a pre-existing condition is an injury pursuant to Section 2(2) of the Act. **Gardner v. Bath Iron Works Corporation**, 11 BRBS 556 (1979), **aff'd sub nom. Gardner v. Director, OWCP**, 640 F.2d 1385 (1st Cir. 1981); **Preziosi v. Controlled Industries**, 22 BRBS 468 (1989); **Januszewicz v. Sun Shipbuilding and Dry Dock Company**, 22 BRBS 376 (1989) (**Decision and Order on Remand**); **Johnson v. Ingalls Shipbuilding**, 22 BRBS 160 (1989); **Madrid v. Coast Marine Construction**, 22 BRBS 148 (1989). Moreover, the employment-related injury need not be the sole cause, or primary factor, in a disability for compensation purposes. Rather, if an employment-related injury contributes to, combines with or aggravates a pre-existing disease or underlying condition, the entire resultant disability is compensable.

Strachan Shipping v. Nash, 782 F.2d 513 (5th Cir. 1986); **Independent Stevedore Co. v. O'Leary**, 357 F.2d 812 (9th Cir. 1966); **Kooley v. Marine Industries Northwest**, 22 BRBS 142 (1989); **Mijangos v. Avondale Shipyards, Inc.**, 19 BRBS 15 (1986); **Rajotte v. General Dynamics Corp.**, 18 BRBS 85 (1986). Also, when claimant sustains an injury at work which is followed by the occurrence of a subsequent injury or aggravation outside work, employer is liable for the entire disability if that subsequent injury is the natural and unavoidable consequence or result of the initial work injury. **Bludworth Shipyard, Inc. v. Lira**, 700 F.2d 1046 (5th Cir. 1983); **Mijangos**, **supra**; **Hicks v. Pacific Marine & Supply Co.**, 14 BRBS 549 (1981). The term injury includes the aggravation of a pre-existing non-work-related condition or the combination of work- and non-work-related conditions. **Lopez v. Southern Stevedores**, 23 BRBS 295 (1990); **Care v. WMATA**, 21 BRBS 248 (1988).

As also noted above, the Law of the Case is that Claimant, as a matter of law, has invoked the Section 20(a) presumption with reference to his left shoulder and heart conditions, that the Employer had timely notice of the July 20, 1994 work-related incident and that the Claimant timely filed for benefits once a dispute arose between the parties.

I shall now discuss the substantial medical evidence offered by the Employer, which evidence I find and conclude rebuts the Section 20(a) statutory presumption under both the “substantial evidence” standard and the “ruling out” standard.

Claimant, who was born on November 19, 1951 and who has a high school education, began to work as a longshoreman in 1983. He worked regularly as a longshoreman and held an “E” card in the union. He did not have any specific job as a longshoreman but worked generally at whatever jobs were available. (TR 20-21)

As already noted above, previous to the accident at issue of July 20, 1994, Claimant had been treated by Dr. Enrique Martinez, a cardiologist. Dr. Martinez first treated Claimant on June 8, 1993, when he admitted him to the hospital with complaints of shortness of breath. (Deposition of Dr. Martinez, p. 8) Claimant was mainly complaining at that time of pulmonary symptoms. (**Id.**, p. 8) Claimant was noted to have uncontrolled high blood pressure which can lead to congestive heart failure. (**Id.**, p. 10) Dr. Martinez saw him next for an office visit on December 6, 1993, when he was noted to be noncompliant with his medications. Dr. Martinez noted specifically at that time that Claimant was able to work. (**Id.**, p. 13)

On July 20, 1994, Claimant was working for Ryan Walsh Stevedoring, Inc., in a warehouse on the dock at Brunswick, Georgia. His job was to straighten mats and hook up paper. Claimant states that he had to do heavy lifting that day because the mats were "really pretty heavy." It was also a hot day. The accident occurred in the morning between 10:00 and 11:00 o'clock a.m. (TR 22-23)

Claimant was told by the stevedore to straighten up some paper and he was in the process of straightening a rug when he was struck and knocked down. (TR 23)

Mr. Lawton L. Moore, another longshoreman, was working "side by side" with the Claimant at the time of the accident. Mr. Moore said that Claimant had his back turned while he was straightening out a mat or rug on the floor when he was knocked down by a forklift truck driver who did not see him. Mr. Moore said he knew Claimant was hurt because the truck "had to hit him and knock him pretty good." (TR 12-14)

Claimant states that he was knocked all the way to the floor and was on his knees, elbow and chest. He also states that his shoulder was hurt because of the way the paper hit him. Claimant states that the stevedore, Michael Phillips, was present and saw the whole thing happen. (TR 23-24)

Claimant immediately stopped work and the Emergency Squad was called. He then drove himself to Glynn Immediate Care and he advised on-duty personnel there that he had been run over by a forklift. He told them that he was leaning over when he was hit from behind by the forklift. He was complaining of pain in the left shoulder and both knees. On physical exam, his left shoulder was tender to palpation. Abduction to 90^{o} produced discomfort. Diagnosis was sprain of the left shoulder. He was told that he could return to work the following day with no lifting over 20 pounds. (CX 1; TR 24-25)

At Glynn Immediate Care, Claimant's blood pressure was noted to be 200/120 and he was given a prescription for Procardia 60 mg. (CX 1)

Dr. Martinez states that a blood pressure reading of 200/120 is "definitely abnormal." Dr. Martinez states that an elevation like that is "pathological" and if sustained long enough will cause damage. Such an uncontrolled blood pressure reading could lead to congestive heart failure. Dr. Martinez also states that pain, heat and heavy lifting can cause blood pressure to go up. Dr. Martinez also states that intense pain from trauma can drive up the blood

pressure in someone who already has a serious heart and blood pressure problem and can thus cause congestive heart failure. Dr. Martinez also states that Procardia is given primarily for high blood pressure and is intended to lower blood pressure. (Deposition of Dr. Martinez, pp. 26-27, 31, 34, 38)

The Employer, Ryan Walsh, Inc., filed a Form LS-202 on July 27, 1994. The form lists nature of injury as "sore shoulders, arms, and upper back." (CX 3)

Mr. Henslee, Vice President of Ryan Walsh in 1994, testified at the hearing that Ryan Walsh had sent in to the Labor Department the form showing nature of injuries as "sore shoulders, arms and upper back." He also acknowledged that Ryan Walsh paid the bill for Claimant's treatment at Glynn Immediate Care. (TR 80)

After he left Glynn Immediate Care, Claimant called Ryan Walsh (TR 80) and told them that he had been injured. He states that they told him "they wasn't going to do anything about it." He states that he asked them about seeing another doctor and they told him that they were not going to do anything and that they were "really kind of hostile about it." Later on that day, Claimant stated that he felt that he was going to be all right. (TR 26)

On the following day, July 21, 1994, Claimant returned to work as a longshoreman. On this day he was driving cars off ships, regular longshore work and not light duty work as the Board has erroneously inferred. While driving a car on July 21, 1994, Claimant got dizzy and "blanked out" and the car ran off the road into a ditch. (TR 27)

Mr. William Hogan, a stevedore for Cooper T. Smith, Claimant's employer on July 21, 1994, testified that there was a heavy rain storm that afternoon and that there was some standing water on the road and that it appeared that Claimant had swerved to miss the standing water and ran his vehicle into the ditch. (TR 61) On July 21, 1994, after the incident at Cooper T. Smith, Claimant was suspended from working as a longshoreman because drugs had been found in his system.

On the following day, July 22, 1994, Claimant presented himself at Charter By the Sea Hospital on St. Simons Island, Georgia, with a history of excessive alcohol and drug use. He stated that he had shortness of breath, that he had been run over by a forklift on the day prior to admission and that he had had pain in his arms and shoulder since that time. He was noted to be complaining of pain in the arms and shoulder. He was also noted to have major depression and severe hypertension. After two days at

Charter, Dr. Roy Thagard determined that he was having acute congestive heart failure and ordered that he be transferred to Southeast Georgia Regional Medical Center for treatment of that condition. (CX 4)

On July 24, 1994, Claimant was admitted to Southeast Georgia Regional Medical Center by Dr. Robert Glover who was covering for Dr. Martinez. Diagnosis was acute recurrent pulmonary edema. By July 27, 1994, the congestive heart failure had cleared but still with persistence of cardiomegaly. Diagnosis was organic heart disease. On July 29, 1994, Dr. Martinez discharged him with instructions that he be transferred back to Charter Hospital.

On August 1, 1994, Claimant was readmitted to Charter Hospital. Diagnosis included recent history of congestive heart failure. While in Charter Hospital this time, Claimant was seen by Dr. Terence Harris, an internist, for subacromial bursitis of the left shoulder based on clinical exam, was given Motrin, and was told to see Dr. Bournigal if his shoulder did not improve. Diagnosis on discharge from the hospital included subacromial bursitis of the shoulder. Altogether, Claimant was in the hospitals for treatment of congestive heart failure and drug and alcohol abuse from July 22, 1994 until August 19, 1994, at which time he was discharged.

After he got out of the hospital in August of 1994, Claimant testified that he was still hoping to go back to work and that he did not consider himself to be permanently disabled from the accident of July 20, 1994.

The record reflects that Claimant had no medical treatment for his back and shoulder problems between August 19, 1994 and November of 1994. (TR 30)

Claimant testified that in November of 1994, he started to have pain in his shoulder and back again and he finally went to the Emergency Room on November 21, 1994. Claimant also testified that he did not have any new accidents between July and November of 1994. (TR 32)

At the Emergency Room of Southeast Georgia Regional Medical Center, he presented with complaints of low back pain and left shoulder pain. He attributed his problems to the prior injury on the job. He was thought to have some musculoskeletal process with his shoulder, either bursitis or calcific tendinitis. Diagnosis was probable bursitis of the left shoulder and lumbosacral sprain. (CX 5)

On December 2, 1994, Claimant returned to the office of Dr. Martinez. Among other things, he complained of pain in the shoulder but Dr. Martinez states that he did not "focus" on that complaint because Claimant had so many other medical problems. (Deposition of Dr. Martinez, p. 39)

On December 15, 1994, Claimant went to the Brown Arrowhead Chiropractic Clinic (Brown Clinic) in Brunswick where he was seen by a Dr. Fisher. He complained of pain in the head, neck, low back, arms and legs and he attributed these problems to the injury where he was run over by the forklift in July of 1994. (Deposition of Dr. Brown, p. 6)

On a visit to the office of Dr. Martinez on May 2, 1995, Claimant was again complaining of shoulder and back problems. (Deposition of Dr. Martinez, p. 35)

Claimant returned and saw Dr. Wilbur Brown at the Brown Clinic on June 18, 1996. He came back for examination and treatment on June 28, 1996. His chief complaint at that time was low back pain and he attributed this problem to being run over by a forklift on the job. Dr. Brown concluded that there was a causal relationship between the reported accident and the patient's symptomatology. Dr. Brown noted that the Claimant had complaints of pain in the neck and through the shoulders into the arms from the time he first saw the Claimant in 1996. (Deposition of Dr. Brown, pp. 9-10, 14, 20, 29)

Dr. Brown started to see the Claimant again in 1997 and saw him right up through the date of his deposition (June 30, 1997). His diagnosis remains myofacitis and lumbar restriction of motion. Dr. Brown stated that Claimant also has cervical and shoulder and arm difficulties. Dr. Brown does not believe the Claimant was capable of doing heavy manual labor at any time since he started to see him in 1996. Dr. Brown does not feel that he is or has been capable of doing manual labor work. (Deposition of Dr. Brown, pp. 31-32)

On June 26, 1996, Claimant was seen at the Emergency Room of Southeast Georgia Regional Medical Center for chronic pain in the neck, back and legs. He attributed these problems to the accident two years before. He was noted to have tight hamstrings with mechanical low back pain and was told not to lift over 25 pounds. (CX 11)

Dr. Martinez testified that he does not believe that Claimant is using illegal drugs any more. Dr. Martinez described Claimant's condition as being "fragile" and stated that the "least little

thing" could cause a problem. Dr. Martinez stated that, in his opinion, Claimant is not "employable" due to his condition and that he is liable to have a "sudden decompensation" or sudden stroke at any time. (Deposition of Dr. Martinez, pp. 47-49)

Dr. Stephen G. Pappas, a neurologist, first saw Claimant on June 2, 1997. He presented with a history of having been hit by a forklift in 1994 and of having persistent back, shoulder and hip pain since that time. After physical exam, the doctor's impression was lumbar degenerative disc disease, sacroilitis and bilateral hip pain. Dr. Pappas ordered an MRI which showed some degeneration at L3 and L4 with some arthritis and osteophytes in that area. There was some protrusion at L3-L4 posteriorly. Dr. Pappas felt that Claimant had developed a chronic pain syndrome. Dr. Pappas also noted pain in the posterior neck and shoulder regions. (Deposition of Dr. Pappas, pp. 5, 7-9, 12)

Dr. Pappas opined that Claimant is significantly limited in his ability to perform normal duties, that he can only stand for a half hour at a time, cannot do lifting over 20 pounds and cannot do repetitive or frequent lifting at all.

Dr. Pappas further opined that the degenerative disc disease such as Claimant has can become symptomatic after an injury. Dr. Pappas felt that it is unlikely that this man will ever return to manual labor work. (Deposition of Dr. Pappas, pp. 13-14)

Claimant testified that by January of 1995, he knew that he would not be able to go back to work as a longshoreman, that he called Ryan Walsh on more than one or two occasions after July 20, 1994, and asked them to send him to a doctor but that they have never approved the request and that he suffers from chronic pain now from the accident and that he is not able to go back to work as a longshoreman, according to the Claimant. (TR 33-36)

Mr. Henslee, Vice President of Ryan Walsh, acknowledged that he received a letter from Claimant's counsel dated May 2, 1995, and another letter dated June 5, 1995. The letter of June 5, 1995 requested that Ryan Walsh provide medical treatment for Claimant's injuries. Mr. Henslee acknowledged that he understood that Claimant was asking for medical treatment and he also admitted that Ryan Walsh did not provide any treatment in response to the letter. The letter of June 5, 1995 included an LS-203 form filing a claim and Mr. Henslee acknowledged that he understood that Claimant was filing a claim for his injuries at that time. Mr. Henslee stated that on June 26, 1995 he called the Labor Department and asked them if the LS-203 had been received by them, according to the Claimant. (TR 81-82, 76; CX 6, CX 8)

According to the Employer, the sole issue in this case on second remand from the Board is whether or not this Administrative Law Judge, in my January 5, 2001 **Decision and Order on Remand - Denying Benefits** properly concluded that the Employer successfully rebutted the Section 20(a) presumption in denying compensation for Claimant's left shoulder condition.

The BRB, in reversing and vacating my conclusions with reference to Claimant's left shoulder condition, points out that the medical reports of record dating from the time of Claimant's July 20, 1994 accident through at least the following two years do, in fact, contain references to Claimant's left shoulder injury and complaints of shoulder pain. In this regard, the history and physical examination report by Charter By-the-Sea Hospital dated July 23, 1994, refers to Claimant's work injury and shoulder pain. (CX 4; RX 3 at 17) During a subsequent hospitalization at Charter By-the-Sea, Dr. Harris, on August 10, 1994, diagnosed Claimant with subacromial bursitis of his left shoulder based on clinical exam. (CX 4; **see also** RX 3 at 3) A report from Southeast Georgia Regional Medical Center reflects that Claimant reported to the emergency room on November 21, 1994, with a complaint of left shoulder pain and contains diagnoses of left shoulder strain and bursitis. (CX 5) Dr. Martinez's records of office visits by Claimant on December 2, 1994 and May 2, 1995 do reflect Claimant's complaints of shoulder pain. (CX 16; RX 5 at 43; RX 11 at 35-41)

Moreover, the Board points out, the records from Claimant's treatment at the Glynn Immediate Care Center reflect that Claimant was released to return to work the following day with a lifting restriction of twenty (20) pounds to continue through July 24, 1994 (CX 1) and that the record evidence indicates that Claimant was not performing "physically demanding" work on July 21, 1994 as "Claimant's duties on that date consisted solely of driving cars off a ship. **See** TR at 27, 48-49, 64-66."[9]

While I previously stated that Claimant's July 20, 1994 work incident was "relatively minor," and I am still of the same opinion, the Board's rejoinder is that the "severity of the work-related incident, however, is not determinative of whether an aggravation occurred since even a minor incident can aggravate a pre-existing (sic) condition and impair a Claimant's ability to work." In fact, according to the Board, "whether the circumstances of a Claimant's employment combine with a pre-existing condition so as to increase his symptoms to such a degree as to incapacitate for

[9]Again the Board ignores uncontroverted evidence that there is no light duty work for a stevedore on the docks and that Claimant's duties of driving vehicles off a ship constituted regular longshore work.

any period of time or whether they actually alter the underlying process is not significant." (Citations omitted) (**Brunson, Decision and Order**, p. 7)

As noted, the Board has "vacate(d) this Administrative Law Judge's determination that Claimant's (left) shoulder condition is unrelated to his employment and remand(ed) the case for reconsideration of the evidence relevant to the cause of Claimant's shoulder condition **in light of the applicable principles regarding aggravation of a pre-existing condition.**" (Citation omitted)(Emphasis added)

Initially, I note with considerable interest that the Board, in this case, is still adhering to the so-called "ruling out" standard dealing with the nature and extent of the evidence needed to rebut the Section 20(a) presumption, **i.e.**, a standard requiring the Employer's medical expert to render that **unequivocal statement totally ruling out any connection between the alleged harm and the maritime experience**.

As already noted above, that standard has been rejected by the First Circuit Court of Appeals in **Bath Iron Works Corp. v. Director, OWCP (Shorette)**, 109 F.3d 53, 31 BRBS 19 (CRT)(1st Cir. 1997) and again in **Bath Iron Works Corp. v. Director, OWCP (Harford)**, 137 F.3d 673, 32 BRBS 45 (CRT)(1st Cir. 1998); by the Seventh Circuit in **American Grain Trimmers, Inc. v. Director, OWCP**, 181 F.3d 810, 33 BRBS 71(CRT) (7th Cir. 1999); and by the Fifth Circuit in **Conoco, Inc. v. Director, OWCP (Prewitt)**, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999). I also note that the Board, without prompting from a Circuit Court, rejected the "ruling out" standard in **O'Kelley v. Department of the Army, NAF**, 34 BRBS 39 (2000), a matter over which I presided and which is now on appeal to the U.S. Court of Appeals for the Fourth Circuit and in which briefs have just been filed.

The "ruling out" standard has been rejected because it places an unreasonable burden on the Employer and goes well beyond the Section 20(a) provision requiring rebuttal of the presumption by "substantial evidence" only. In my twenty-four (24) years as an Administrative Law Judge my experience is that most physicians are reluctant to render that **unequivocal statement** and usually answer hypothetical questions relating to a possible causal relationship between the alleged harm and the maritime employment asked of them by Claimant's counsel, "well, counselor, as you know in this world anything is possible." Such answer is given, in my opinion, because of the hovering presence of attorneys specializing in medical malpractice litigation.

I would also note that the Eleventh Circuit usually follows Fifth Circuit decisions unless it specifically decides not to follow a decision rendered by that Court. Thus, it remains to be seen whether or not **Brown v. Jacksonville Shipyards, Inc.**, 893 F.2d 294, 23 BRBS 22 (CRT) (11th Cir. 1990) is still good law in that circuit. In this regard **see Bonner v. City of Prichard, Alabama**, 661 F.2d 1206 (11th Cir. 1981).

Section 20(a) "presumes" that a disability that could be caused by work has been caused by work, unless the employer introduces "substantial evidence" that the disability was not caused by the work. "Substantial evidence" is a term that appears in a wide range of statutes. When Congress has used the same words again and again, "we can only assume it intended them to have the same meaning that Courts have already given them". **Holmes v. SIPC**, 503 U.S. 258 (1992). Thus, "substantial evidence" has the same meaning wherever it is found in the United States Code. "Substantial" means more than a "scintilla" but less than a "preponderance" of evidence. **Evans Financial Corporation v. OWCP**, 16 F.3d 30 (D.C. Cir.)

It would seem obvious that expert medical testimony expressing an opinion on the cause of disability would always be more than a "scintilla" which is all that Congress has required to rebut the Section 20(a) presumption, and I so find and conclude.

In the present case, two Administrative Law Judges admitted and reviewed the Employer's medical evidence and found it to be not only credible, but decisive and probative. It is, in fact, overwhelming, in my judgment.

The Employer submits that the Benefits Review Board improperly remanded this case for consideration of the Section 20(a) presumption and that the Benefits Review Board is not authorized to change the meaning of the statute it administers by requiring more than Congress has required. Medical testimony that is more than a "scintilla" may not be credible to the Benefits Review Board, but credibility is a question for the trier of fact to determine and not the Benefits Review Board.

The Employer also submits that the medical evidence combined with the lay testimony adequately meets the standards of **Brown v. Jacksonville Shipyards, Inc.**, 893 F.2d 294 (11th Cir. 1990), that it has not only rebutted the presumption, but Dr. Pappas, a neurologic expert, has also ruled out any causal connection. In fact, no physician has made a probative and persuasive correlation at all between the accident of July 20, 1994 and any shoulder problems Claimant now experiences. Most of the medical doctors who

have treated Claimant regularly, such as Dr. Thompson and Dr. Martinez, have not found any objective evidence relating to the subjective complaints, according to the Employer, who also points out that the Benefits Review Board appears to have given limited credence to the Claimant's credibility problems. The Claimant is completely non-credible, as was established in the substantial conflicts between the medical reports and his hearing testimony. His lack of credibility is central to this case, which both Administrative Law Judges have acknowledged. This lack of credibility, combined with the medical evidence, make this a claim that should be denied, according to the Employer's essential thesis.

I essentially agree with the Employer's arguments but the Board, in its specific directions to me, has held, as a matter of law, that I "must accord Claimant the benefit of the Section 20(a) presumption of causation with reference to his shoulder injury" and on rebuttal "must consider the evidence supporting Employer's position and specifically discuss whether Employer has produced substantial evidence to meet its rebuttal burden. **See, e.g., Gooden (v. Director, OWCP)**, 135 F.3d 1066, 32 BRBS 59(CRT)(5th Cir. 998); **Gardner v. Director, OWCP**, 640 F.2d 1385, 13 BRBS 101 (1st Cir. 1981), **aff'g** 11 BRBS 561 (1971)." **Brunson, Decision and Order**, pp 7-8).

Be that as it may, the Board has adopted herein the "ruling out" standard and I am constrained to follow that standard as the Law of the Case. It would be with the utmost of trepidation and apprehension for me to state the Board has adopted an incorrect and/or obsolete standard. Only the Board can do so upon reconsideration and, failing that, then the U.S. Court of Appeals for the Eleventh Circuit may be afforded the opportunity in this case.

I shall now proceed to weigh and evaluate all of the evidence relating to Claimant's left shoulder condition pursuant to the Board's directions and instructions to me.

As already noted, this closed record contains medical evidence in the form of both medical reports and medical depositions.

1. **Glynn Immediate Care.** On July 20, 1994, Claimant was treated at Glynn Immediate Care. He complained only of pain to his left shoulder. This was the only authorized medical treatment relative to the injury of July 20, 1994. Claimant also reported that he was out of blood pressure medicine and he was given a prescription for Procardia, apparently based on his previous chart.

2. **Dr. Robert Thompson.** Long before his treatment at Glynn Immediate Care, Claimant was a patient of Dr. Robert H. Thompson, an internist in Brunswick. (RX 2, medical reports of Dr. Thompson; RX 10, Deposition of Dr. Thompson) Dr. Thompson testified that his first documented treatment of Jeremiah Brunson was in April, 1983, although there could have been previous treatment since Dr. Thompson has purged some of his records. That treatment was for a strain of his right foot and left wrist, a job injury that had occurred with Palmetto Street Company. Claimant was injured when he loaded soybean bags onto a barge. (RX 10-10)

Dr. Thompson treated Claimant frequently, but did not see him between 1992 and 1996. On December 23, 1996, Claimant presented to Dr. Thompson complaining of severe right upper quadrant pain that had begun the previous day after partying. No mention was made of any shoulder pain or of anything having to do with any injury. Claimant reported to Dr. Thompson that he had been at a party the previous Saturday night, and that he had been smoking and drinking. Dr. Thompson hospitalized Claimant and diagnosed diverticulitis. Claimant did not relate this treatment to any injuries or trauma, although Dr. Thompson specifically asked him about injuries.

Dr. Thompson testified that at no time during his treatment did Claimant relate that he had been involved in an accident in 1994. At no time did he mention his injury to Dr. Thompson. At no time did he make any complaints of shoulder pain. (RX 10-33) On December 23, 1996, Dr. Thompson signed an Examining Physician's Statement, Exhibit RX 2-1. Dr. Thompson related Claimant's disability to acute abdominal pain, diverticulitis, alcoholism, smoke abuse, hypertension, diabetes and cardiomyopathy. (RX 10-33, 36) There is no mention of any job injury or any problems relating to his work. Dr. Thompson also testified that he could not relate any of the symptoms that he has treated since 1994, including hypertension, pulmonary edema and sleep apnea, to the accident of July 20, 1994. Dr. Thompson also clarified that he did not treat Claimant in 1994. It was his opinion that the problems that he treated were not related to the bump by the forklift.

3. **Charter Hospital**. Other pertinent medical evidence includes the records from Charter-By-the-Sea, where the Claimant admitted himself on July 22, 1994. At the time of his admission, the Claimant reported to his physician prolonged daily and frequent use of alcohol, marijuana and cocaine. At the time of his admission, he was mildly intoxicated. He admitted to the physician that he smoked two marijuana joints on the day of his admission to Charter, and had last used cocaine two days earlier, which would have been the date of injury. This conflicts with Claimant's hearing testimony. Also at the time of his admission, he was noted

to have hypertension, and pain in his feet from arthritis. His admission history and physical did reference his July 20, 1994 injury, but limited his complaints as noted. His physical examination was normal, specifically the examination of his extremities and his neurological exam. I note, most important, that his admission diagnoses make no reference to his arm and shoulder symptoms. After approximately two days in Charter-By-the-Sea, the Claimant was transferred to Southeast Georgia Regional Medical Center (SEGRMC) after he had developed respiratory distress and congestive heart failure. He was re-admitted to Charter on August 1, 1994 and he was discharged again on August 19, 1994. During his SEGRMC hospitalization, Dr. Martinez again noted that Claimant was not following his diet, and was poorly compliant. He also continued to smoke. It is noteworthy that even when he was re-admitted to Charter on August 1, 1994 after his SEGRMC hospitalization, he still tested positive for marijuana.

4. **Dr. Enrique Martinez.** Dr. Martinez has been the Claimant's cardiologist since 1993 and has probably afforded more treatment to Claimant than any other doctor.

When first seen in follow-up with Dr. Martinez following the 1994 hospitalization at Charter, Claimant's blood pressure was extremely high, 240/120. The office notes for August, 1994 make absolutely no reference to any job injury or any shoulder problems. To the contrary, they make reference to cocaine use, to non-compliance with diet, and to the patient's knowledge that he needs to change his lifestyle. In fact, Dr. Martinez's medical reports from August, 1994 through August 2, 1996 make absolutely no reference to any job injury. The Claimant was seen more than fifty (50) times during this interval. He did complain about other medical problems including respiratory infections and impotence, but there is no mention of any back, neck, shoulder or leg pain, and I so find and conclude.

Dr. Martinez testified that when Claimant was disabled in 1994, it was for medical reasons including heart failure, diabetes and uncontrolled high blood pressure and that Claimant is still disabled due to those conditions. Dr. Martinez also testified that the blood pressure reading recorded at Glynn Immediate Care on July 20, 1994 was not related to the forklift incident. Dr. Martinez also noted a social security disability report dated May 18, 1995, in which he based Claimant's disability on "severe hypertension, congestive heart failure, alcoholism and drug addition. In no way to I mention the shoulder or back problems as part of or aggravating or causing or producing." Dr. Martinez noted that if the complaints of shoulder and back pain had been of any

significance, he would have referred Claimant to an orthopedic surgeon for further evaluation.

5. **Dr. Stephen Pappas.** Dr. Pappas is a neurologist. He testified that he examined Claimant and had an MRI performed. Dr. Pappas testified that the MRI scan that he performed showed some degenerative disc disease. The findings on the MRI were not indicative of any trauma. Dr. Pappas testified that if Claimant's shoulder condition did result from trauma, he would have expected the pain to develop within days or possibly weeks of a trauma. It would be highly unusual for the pain to develop six months or one year after trauma.

According to the Employer, if the Employer demonstrates that Claimant's underlying condition was not aggravated by employment activities, the Claimant would fail to meet his **prima facie** case of physical harm or pain and the Section 20(a) presumption would not come into play. **Courn's v. Matson Terminals**, 21 BRBS 252 (1988). Medical evidence in this case is overwhelming that the Claimant's alleged shoulder condition is in no way related to a minor job event, according to the Employer, who also submits that the Section 20(a) presumption was not invoked when an Administrative Law Judge found that the Claimant's account of an accident and his resulting injury was not credible. **Boudreaux v. Milpark Drilling Fluids**, 29 BRBS 249 (1995). In **Bolden v. GATX Terminal Corp.**, 30 BRBS 72 (1996), the BRB found that the claimant did not meet his **prima facie** case because of inconsistent information given to his employer, particularly in light of that claimant's history of prior work injuries, the filing of claims and his knowledge about reporting accidents. In this case, it is undisputed that the Claimant has sustained several previous lost time injuries. Claimant is well aware of the requirements for making a claim and he did not follow them in this case. **See also Grizzle v. Ingalls Shipbuilding, Inc.**, 29 BRBS 671 (ALJ)(1995), in which the Administrative Law Judge held that the claimant failed to make his **prima facie** case particularly in light of the claimant's inconsistent testimony, even with some medical testimony supporting the claim. Without any proof of a harm, Claimant is not entitled to the benefit of the Section 20(a) presumption, according to the Employer.

I agree with the Employer.

However, the BRB has held, as a matter of law, that the Claimant is entitled to the benefits of the Section 20(a) presumption and that I am directed to determine whether or not this Employer has rebutted that presumption under the "ruling out" standard, pursuant to **Brown, supra**.

As an alternate argument, the Employer submits that even if the presumption is applicable, it has been rebutted and with the abolition of the "true doubt" rule, the claim must fail, the Employer pointing out that Judge Murty and the undersigned, who are triers of fact, both correctly held that no work injury caused the harm allegedly sustained by Claimant. The Claimant was involved in a minor incident on July 20, 1994. His initial complaint was limited to his shoulder and he was released to return to his regular work, although formally on lifting restrictions for three (3) days, and returned to work the following day for another employer. The Employer submits, contrary to the BRB opinion, that there is no light duty for longshoremen. His employer the following day testified that Claimant helped drive 995 motor vehicles off a roll-on/roll-off ship. Claimant never complained of any physical problems, he never asked for any limited work, and he never mentioned any accident or any problems resulting from an accident. He was able to complete all of his assigned duties that day as his encounter with the ditch occurred near the end of his shift. Claimant discontinued work on July 22, 1994 for reasons having nothing to do with the July 20, 1994 bump from a forklift. Rather, he discontinued working on July 22, 1994 only because he had tested positive for cocaine on two consecutive days and was forbidden to work by the collective bargaining unit. He has since been banned from the union and longshore work as a three-time offender.

There is absolutely no evidence of any disability resulting from the bump by the forklift, which rendered complaints only of shoulder pain on one day. Clearly the evidence establishes that had it not been for the drug use, Claimant would have continued to work. Even Claimant testified that he did not try to return to work on the docks because he failed two drug tests within the same week, and I so find and conclude.

Even if it is ultimately concluded that the Section 20(a) presumption and the "ruling out" standard do apply, the Employer has more than met its burden of presenting "specific and comprehensive evidence" sufficient to sever the causal connection between the alleged harm, that relatively minor incident and the maritime employment, and I so find and conclude.

As can be readily seen, I have extensively reconsidered all of the evidence relating to Claimant's left shoulder condition and I again find and conclude that the Employer has rebutted the statutory presumption in Claimant's favor by "substantial evidence" and by "specific and comprehensive evidence" that severs the connection between the alleged harm, **i.e.**, the left shoulder condition, and the July 20, 1994 "relatively minor" incident. The

Employer authorized and paid for Claimant's treatment on that day at the Glynn Immediate Care Center, where he was treated conservatively and released with work restrictions against lifting more than twenty (20) pounds. He then went to work as a longshore worker on the next day and that work was regular work and not light duty, as the Board seems to imply, and I so find and conclude.

While the Board, in footnote 3, refers to instances wherein Claimant reported left shoulder complaints, **i.e.**, on July 23, 1994 (CX 4), on August 10, 1994 (CX 4; RX 3 at 3), on November 21, 1994 (CX 5) and on December 2, 1994 and on May 2, 1995 to Dr. Martinez (CX 16; RX 5 at 43; RX 11 at 35-41), none of those doctors has attributed any causal relationship between those left shoulder symptoms and the July 20, 1994 incident, and I so find and conclude. There is absolutely no credible evidence that supports any disability based on a shoulder injury resulting from that July 20, 1994 incident.

Most noteworthy are the reports and opinions of Dr. Steven Pappas, a Board-Certified neurologist, who has performed diagnostic studies that demonstrate the existence of a degenerative condition that is not the result of trauma and that was not aggravated, accelerated or exacerbated by the July 20, 1994 incident. According to Dr. Pappas, if trauma had impacted the underlying degenerative condition, he would have expected Claimant to have been symptomatic much earlier. I previously accepted forthright opinions of Dr. Pappas but apparently these were overlooked or disregarded by the Board. I again accept the well-reasoned and well-documented opinions of Dr. Pappas who, in my judgment, is most qualified to testify about causation and he persuasively testified that there was no causation between the July 20, 1994 incident and the left shoulder symptoms reported to him by the Claimant years later, and I again so find and conclude. That opinion, in my judgment, satisfied the "ruling out" standard, if such standard is still viable in the Eleventh Circuit.

Accordingly, in view of the foregoing, I find and conclude that the Employer has rebutted the statutory presumption in Claimant's favor, that my reconsideration of the evidence leads me to conclude that there is absolutely no causal relationship between Claimant's left shoulder condition and the July 20, 1994 incident and that the claim herein must again be **DENIED**.

However, in the event that the Board should hold, as a matter of law, that there is no rebuttal, I shall resolve the remaining issues.

Claimant has a history of filing numerous claims for accidents on the waterfront as a stevedore and he, of all employees, knows the procedures to be followed in reporting injuries and seeking benefits therefor. This record is replete with Claimant's inconsistent, contradictory, vague and evasive statements about what happened on July 20, 1994 and what bodily parts were affected, if any, and I so find and conclude.

As also summarized above, Claimant has given inconsistent statements to the doctors treating him; he has given contradictory statements to the ILA in filing his applications for his union pension; he has also given contradictory statements in his application for Social Security Administration disability benefits. While the Employer has stipulated to the occurrence of that relatively minor incident on July 20, 1994, Claimant must still establish that he has sustained economic disability therefrom.

Yes, Claimant was involved in an incident on July 20, 1994, but his history report to on-duty personnel at Glynn Immediate Care was limited to his shoulder and he was released to return to work and told not to lift anything over twenty (20) pounds FOR THREE DAYS and returned to work the following day for another stevedoring employer. It was the Claimant's own testimony that no light duty is available for longshoremen; therefore it is obvious that he was able to work without restrictions. His employer the following day, Mr. Hogan, testified that Claimant helped drive 995 motor vehicles off a roll-on/roll-off ship. He never complained of any physical problems, he never asked for any limited work, and he never mentioned any accident or any problems resulting from an accident. Claimant discontinued work on July 22, 1994 for reasons having nothing to do with the July 20, 1994 incident. Rather, Claimant discontinued working on July 22, 1994 because had tested positive for cocaine on two consecutive days and was prohibited from working by Mr. Hogan's company and by the union. Claimant, according to Steven Zadach, was under a 90-day suspension due to his drug use and was not eligible for any work as a longshoreman. There is absolutely no evidence of any disability resulting from the bump by the forklift, an incident which produced complaints only of shoulder pain on one day. Clearly the evidence establishes that had it not been for the drug use, Claimant would have continued to work. Claimant candidly testified that he did not try to go to work because he knew that he was under suspension and could not work on the docks, and I so find and conclude.

Even if it is concluded that the Section 20(a) presumption has not been rebutted, ample evidence, particularly medical evidence, establishes that Claimant has sustained no disability resulting

from this accident, and I so find and conclude. He is disabled from waterfront work because he failed three (3) drug tests.

The Claimant cannot establish by a preponderance of the evidence that any disability is causally related to his job. In this regard, see **Director, OWCP v. Greenwich Colleries/Maher Terminals**, **supra** (the U.S. Supreme Court holding that the "true doubt" rule has been rejected).

However, if reviewing authorities should hold, as a matter of law, that Claimant has established disability as a result of the June 20, 1994 incident, I shall now discuss another reason to deny this claim.

Timely Notice of Injury

Section 12(a) requires that notice of a traumatic injury or death for which compensation is payable must be given within thirty (30) days after the date of the injury or death, or within thirty (30) days after the employee or beneficiary is aware of a relationship between the injury or death and the employment. In the case of an occupational disease which does not immediately result in disability or death, appropriate notice shall be given within one (1) year after the employee or claimant becomes aware, or in the exercise of reasonable diligence or by reason of medical advice should have been aware, of the relationship among the employment, the disease and the death or disability. Ordinarily, the date on which a claimant was told by a doctor that he had a work-related injury is the controlling date establishing awareness, and a claimant is required in the exercise of reasonable diligence to seek a professional diagnosis only when he has reason to believe that his condition would, or might, reduce his wage-earning capacity. **Osmundsen v. Todd Pacific Shipyard**, 755 F.2d 730, 732 and 733 (9th Cir. 1985); **see** 18 BRBS 112 (1986) (**Decision and Order on Remand**); **Lindsay v. Bethlehem Steel Corporation**, 18 BRBS 20 (1986); **Cox v. Brady Hamilton Stevedore Company**, 18 BRBS 10 (1985); **Jackson v. Ingalls Shipbuilding Division, Litton Systems, Inc.**, 15 BRBS 299 (1983); **Stark v. Lockheed Shipbuilding and Construction Co.**, 5 BRBS 186 (1976). The relevant inquiry is the date of awareness of the relationship among the injury, employment and disability. **Thorud v. Brady-Hamilton Stevedore Company**, 18 BRBS 232 (1986). **See also Bath Iron Works Corporation v. Galen**, 605 F.2d 583 (1st Cir. 1979); **Geisler v. Columbia Asbestos, Inc.**, 14 BRBS 794 (1981).

The Employer had notice of the incident of June 20, 1994 on the same day and I so find and conclude.

Statute of Limitations

Section 13(a) provides that the right to compensation for disability or death resulting from a traumatic injury is barred unless the claim is filed within one (1) year after the injury or death or, if compensation has been paid without an award, within one (1) year of the last payment of compensation. The statute of limitations begins to run only when the employee becomes aware of the relationship between his employment and his disability. An employee becomes aware of this relationship if a doctor discusses it with him. **Aurelio v. Louisiana Stevedores**, 22 BRBS 418 (1989). The 1984 Amendments to the Act have changed the statute of limitations for a claimant with an occupational disease. Section 13(b)(2) now requires that such claimant file a claim within two years after claimant becomes aware, or in the exercise of reasonable diligence or by reason of medical advice should have become aware, of the relationship among his employment, the disease, and the death or disability. **Osmundsen v. Todd Pacific Shipyards**, 755 F.2d 730 (9th Cir. 1985), and the Board's **Decision and Order on Remand** at 18 BRBS 112 (1986); **Manders v. Alabama Dry Dock & Shipbuilding**, 23 BRBS 19 (19889). Furthermore, pertinent regulations state that, for purposes of occupational diseases, the respective notice and filing periods do not begin to run until the employee is disabled or, in the case of a retired employee, until a permanent impairment exists. **Lombardi v. General Dynamics Corp.**, 22 BRBS 323, 326 (1989); **Curit v. Bath Iron Works Corp.**, 22 BRBS 100 (1988); **Lindsay v. Bethlehem Steel Corporation**, 18 BRBS 20 (1986); 20 C.F.R. §702.212(b) and §702.222(c).

The Benefits Review Board has discussed the pertinent elements of an occupational disease in **Gencarelle v. General Dynamics Corp.**, 22 BRBS 170 (1989), **aff'd**, 892 F.2d 173, 23 BRBS 13 (CRT) (2d Cir. 1989).

It is well-settled that the employer has the burden of establishing that the claim was not timely filed. 33 U.S.C. §920(b); **Fortier v. General Dynamics Corporation**, 15 BRBS 4 (1982), **appeal dismissed sub nom. Insurance Company of North America v. Benefits Review Board**, 729 F.2d 1441 (2d Cir. 1983).

The Employer submits that the claim was not timely filed within one (1) year of the July 20, 1994 incident for the following reasons:

Mr. Stan Henslee, who formerly was responsible for claims at Ryan Walsh and is now Vice-President of Claims for Homeport Insurance Company, testified as to Ryan Walsh’s activity on this

claim and introduced into evidence Ryan Walsh's claims' file relating to the Claimant. Mr. Henslee testified that he personally began handling the file in late 1994 or early 1995 and that at the time of injury, medical treatment was authorized with Glynn Immediate Care. The medicals were paid because at the time of treatment, the Employer was unaware of the positive drug screen and the Employer felt obligated to pay for the medical treatment. (TR 73)

The first activity following the injury was when the Claimant's attorney, Mr. Boshears, wrote a letter to Mr. Henslee dated May 2, 1995 and Mr. Henslee responded on May 17, 1995 with a copy of the LS-202. (TR 75, RX 12-6) On June 5, 1995, Mr. Boshears wrote another letter contending that an LS-203 was being filed. There was no accompanying letter to the U.S. Department of Labor nor was there any evidence that the LS-203 was actually enclosed with the letter of June 5, 1995. (Tr 76, RX 12-5) In response to Mr. Boshears' letter, Mr. Henslee called the U.S. Department of Labor on June 26, 1995 and learned that no claim in any form had been filed. (TR 76, RX 12-3) Mr. Henslee called the U.S. Department of Labor again on November 7, 1995, and was again advised that no claim for injury had been filed by or on behalf of Claimant.

Mr. Henslee did receive correspondence from the Department of Labor dated November 14, 1995 indicating that no claim had been filed. (TR 77) On February 19, 1996, Mr. Henslee received a copy of an LS-203, Notice of Claimant, from the U.S. Department of Labor which showed a stamped filing dated of December 7, 1995. In response, Mr. Henslee filed a Notice to Controvert (**i.e.**, Form LS-207) on February 21, 1996. (TR 78; RX 12-3; RX 12-4)

Mr. Henslee testified that the next request for medical treatment from Claimant was made in June, 1996, when permission was sought for treatment by a chiropractor. (TR 78; RX 12-3)

As Claimant sustained his work-related incident on July 20, 1994, he was absolutely required to file the Form LS-203 by July 20, 1995, and this mandatory obligation is not satisfied by his attorney sending a letter to the Employer and advising that a claim for benefits would be filed, and I so find and conclude. I note that the claim herein was not filed until December 7, 1995, well after the filing requirement.

Although invited to do so, Claimant has submitted no legal argument or case citations demonstrating that his claim was timely or that its late filing should be excused by this Administrative Law Judge.

Nature and Extent of Disability

It is axiomatic that disability under the Act is an economic concept based upon a medical foundation. **Quick v. Martin**, 397 F.2d 644 (D.C. Cir. 1968); **Owens v. Traynor**, 274 F. Supp. 770 (D.Md. 1967), **aff'd**, 396 F.2d 783 (4th Cir. 1968), **cert. denied**, 393 U.S. 962 (1968). Thus, the extent of disability cannot be measured by physical or medical condition alone. **Nardella v. Campbell Machine, Inc.**, 525 F.2d 46 (9th Cir. 1975). Consideration must be given to claimant's age, education, industrial history and the availability of work he can perform after the injury. **American Mutual Insurance Company of Boston v. Jones**, 426 F.2d 1263 (D.C. Cir. 1970). Even a relatively minor injury may lead to a finding of total disability if it prevents the employee from engaging in the only type of gainful employment for which he is qualified. (**Id**. at 1266)

Claimant has the burden of proving the nature and extent of his disability without the benefit of the Section 20 presumption. **Carroll v. Hanover Bridge Marina**, 17 BRBS 176 (1985); **Hunigman v. Sun Shipbuilding & Dry Dock Co.**, 8 BRBS 141 (1978). However, once claimant has established that he is unable to return to his former employment because of a work-related injury or occupational disease, the burden shifts to the employer to demonstrate the availability of suitable alternative employment or realistic job opportunities which claimant is capable of performing and which he could secure if he diligently tried. **New Orleans (Gulfwide) Stevedores v. Turner**, 661 F.2d 1031 (5th Cir. 1981); **Air America v. Director**, 597 F.2d 773 (1st Cir. 1979); **American Stevedores, Inc. v. Salzano**, 538 F.2d 933 (2d Cir. 1976); **Preziosi v. Controlled Industries**, 22 BRBS 468, 471 (1989); **Elliott v. C & P Telephone Co.**, 16 BRBS 89 (1984). While Claimant generally need not show that he has tried to obtain employment, **Shell v. Teledyne Movible Offshore, Inc.**, 14 BRBS 585 (1981), he bears the burden of demonstrating his willingness to work, **Trans-State Dredging v. Benefits Review Board**, 731 F.2d 199 (4th Cir. 1984), once suitable alternative employment is shown. **Wilson v. Dravo Corporation**, 22 BRBS 463, 466 (1989); **Royce v. Elrich Construction Company**, 17 BRBS 156 (1985).

On the basis of the totality of this closed record, I find and conclude that this closed record has established that Claimant’s June 20, 1994 incident does not prevent his return to work as a longshore worker.

As noted, he did return to work for another employer the following day, was able to perform all of his assignments and only

stopped because of personal use of illicit and controlled substances. Claimant can physically return to work on the docks but his union membership has been cancelled, thereby preventing his return to work as a longshore worker. That personal lifestyle alone prevents his return to the docks, and I so find and conclude. The medical evidence on his other medical problems has been summarized above and the Board has held, as a matter of law, that Claimant's lumbar and cardiac problems are not work-related conditions.

Medical Expenses

An Employer found liable for the payment of compensation is, pursuant to Section 7(a) of the Act, responsible for those medical expenses reasonably and necessarily incurred as a result of a work-related injury. **Perez v. Sea-Land Services, Inc.**, 8 BRBS 130 (1978). The test is whether or not the treatment is recognized as appropriate by the medical profession for the care and treatment of the injury. **Colburn v. General Dynamics Corp.**, 21 BRBS 219, 22 (1988); **Barbour v. Woodward & Lothrop, Inc.**, 16 BRBS 300 (1984). Entitlement to medical services is never time-barred where a disability is related to a compensable injury. **Addison v. Ryan-Walsh Stevedoring Company**, 22 BRBS 32, 36 (1989); **Mayfield v. Atlantic & Gulf Stevedores**, 16 BRBS 228 (1984); **Dean v. Marine Terminals Corp.**, 7 BRBS 234 (1977). Furthermore, an employee's right to select his own physician, pursuant to Section 7(b), is well settled. **Bulone v. Universal Terminal and Stevedore Corp.**, 8 BRBS 515 (1978). Claimant is also entitled to reimbursement for reasonable travel expenses in seeking medical care and treatment for his work-related injury. **Tough v. General Dynamics Corporation**, 22 BRBS 356 (1989); **Gilliam v. The Western Union Telegraph Co.**, 8 BRBS 278 (1978).

In **Shahady v. Atlas Tile & Marble**, 13 BRBS 1007 (1981), **rev'd on other grounds**, 682 F.2d 968 (D.C. Cir. 1982), **cert. denied**, 459 U.S. 1146, 103 S.Ct. 786 (1983), the Benefits Review Board held that a claimant's entitlement to an initial free choice of a physician under Section 7(b) does not negate the requirement under Section 7(d) that claimant obtain employer's authorization prior to obtaining medical services. **Banks v. Bath Iron Works Corp.**, 22 BRBS 301, 307, 308 (1989); **Jackson v. Ingalls Shipbuilding Division, Litton Systems, Inc.**, 15 BRBS 299 (1983); **Beynum v. Washington Metropolitan Area Transit Authority**, 14 BRBS 956 (1982). However, where a claimant has been refused treatment by the employer, he need only establish that the treatment he subsequently procures on his own initiative was necessary in order to be

entitled to such treatment at the employer's expense. **Atlantic & Gulf Stevedores, Inc. v. Neuman**, 440 F.2d 908 (5th Cir. 1971); **Matthews v. Jeffboat, Inc.**, 18 BRBS at 189 (1986).

An employer's physician's determination that Claimant is fully recovered is tantamount to a refusal to provide treatment. **Slattery Associates, Inc. v. Lloyd**, 725 F.2d 780 (D.C. Cir. 1984); **Walker v. AAF Exchange Service**, 5 BRBS 500 (1977). All necessary medical expenses subsequent to employer's refusal to authorize needed care, including surgical costs and the physician's fee, are recoverable. **Roger's Terminal and Shipping Corporation v. Director, OWCP**, 784 F.2d 687 (5th Cir. 1986); **Anderson v. Todd Shipyards Corp.**, 22 BRBS 20 (1989); **Ballesteros v. Willamette Western Corp.**, 20 BRBS 184 (1988).

Section 7(d) requires that an attending physician file the appropriate report within ten days of the examination. Unless such failure is excused by the fact-finder for good cause shown in accordance with Section 7(d), claimant may not recover medical costs incurred. **Betz v. Arthur Snowden Company**, 14 BRBS 805 (1981). **See also** 20 C.F.R. §702.422. However, the employer must demonstrate actual prejudice by late delivery of the physician's report. **Roger's Terminal**, **supra**.

It is well-settled that the Act does not require that an injury be disabling for a claimant to be entitled to medical expenses; it only requires that the injury be work related. **Romeike v. Kaiser Shipyards**, 22 BRBS 57 (1989); **Winston v. Ingalls Shipbuilding**, 16 BRBS 168 (1984); **Jackson v. Ingalls Shipbuilding**, 15 BRBS 299 (1983).

On the basis of the totality of the record, I find and conclude that Claimant has shown good cause, pursuant to Section 7(d). Claimant advised the Employer of his work-related injury on July 20, 1994 and requested appropriate medical care and treatment. The Employer did accept the claim and did authorize such medical care and paid for the treatment that he received on July 20, 1994. However, Claimant was not pleased that he was released to return to work with a lifting restriction for three (3) days and he then went doctor-shopping for those physicians who would support his application for Social Security Administration disability benefits.

As Claimant did not request prior approval for this change of physicians and as he was not referred to a specialist on July 20, 1994, the Employer is not responsible for the unauthorized medical treatment Claimant received on and after July 21, 1994. On this issue, I credit the credible, probative and persuasive testimony of

Mr. Henslee, as opposed to the inconsistent and contradictory testimony of the Claimant.

Moreover, as there is no credible medical evidence that Claimant requires medical care and treatment for his left shoulder and that such treatment is related to the July 20, 1994 incident, and as the Employer has not refused any medical treatment causally related to such incident, there is no need for an award of future medical benefits herein as a claim for medical benefits is never time-barred, and I so find and conclude. On this issue, I again credit the Employer's evidence, as opposed to the inconsistent and contradictory testimony of the Claimant.

One further point. I note in passing that the Board, in footnote 4, has completely misinterpreted the thrust of my section dealing with a so-called intervening cause. As the Board has rejected that section in a footnote, I see no need for further comment. That section will stand for future appellate review.

ENTITLEMENT

Since Claimant's July 20, 1994 injury has not resulted in any disability and since there is no need for any medical treatment for his left shoulder, he is not entitled to additional benefits in this proceeding and his claim for benefits is hereby **DENIED**. Since any disability Claimant now experiences is due to his other medical problems, as well as his personal life style, especially his use of illicit and controlled substances, he is not entitled to benefits in this proceeding and his claim for benefits is hereby **DENIED**.

The rule that all doubts must be resolved in Claimant's favor does not require that this Administrative Law Judge always find for Claimant when there is a dispute or conflict in the testimony. It merely means that, if doubt about the proper resolution of conflicts remains in the Administrative Law Judge's mind, these doubts should be resolved in Claimant's favor. **Hodgson v. Kaiser Steel Corporation**, 11 BRBS 421 (1979). Furthermore, the mere existence of conflicting evidence does not, **ipso facto**, entitle a Claimant to a finding in his favor. **Lobin v. Early-Massman**, 11 BRBS 359 (1979).

While Claimant submits that all doubtful fact questions are to be resolved in favor of the injured employee, the mere presence of conflicting evidence does not require a conclusion that there are doubts which must be resolved in claimant's favor. **See Hislop v. Marine Terminals Corp**., 14 BRBS 927 (1982). Rather, before applying the "true doubt" rule, the Benefits Review Board

has held that this Administrative Law Judge should attempt to evaluate the conflicting evidence. **See Betz v. Arthur Snowden Co**., 14 BRBS 805 (1981). [Moreover, the U.S. Supreme Court has abolished the "true doubt" rule in **Maher Terminals, Inc. v. Director**, OWCP, 512 U.S. 267, 114 S.Ct. 2251, 28 BRBS 43 (CRT)(1994), **aff'g** 992 F.2d 1277, 27 BRBS 1 (CRT)(3d Cir. 1993)].

As Claimant has not successfully prosecuted this claim, his attorney is not entitled to a fee award.

ORDER

It is therefore **ORDERED** that the claim for compensation benefits filed by Jeremiah Brunson shall be, and the same is hereby again **DENIED**.

A

DAVID W. DI NARDI
District Chief Judge

Boston, Massachusetts
DWD:jl